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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1976

NO. 76-1308

RICARDO WOODS

and

ROLAND REAVES,

Petitioners,

vs.

STATE OF OHIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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For the reasons set forth above, Certiorari should be granted.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

Petitioners pray that a Writ of Certiorari issue to review the Judgment of the Supreme Court of Ohio entered in the above entitled cause on December 1, 1976, imposing upon Petitioners a sentence of death in the electric chair, which is repugnant to and violative of the Eighth Amendment of the Constitution of the United States.

OPINION BELOW

The Opinion of the Supreme Court of Ohio is reported at 48 Ohio St. 2d 127, 357 N.E. 2d 1059, and printed herein

as Appendix A. The Order of the Supreme Court of Ohio denying rehearing, issued December 22, 1976, is printed herein as Appendix B. The Order of the Supreme Court of Ohio Staying Execution of Sentence is printed herein as Appendix C. The Opinion of the Court of Appeals for the First Appellate District of Ohio, Hamilton County, is unreported and is printed herein as Appendix D. The verdict of the jury, Hamilton County Court of Common Pleas, is printed herein as Appendix E, and the Judgment of the Hamilton County Court of Common Pleas appears only as the original dockets and records of that Court. The Indictment alleging the criminal offense of Aggravated Murder, which instituted the Criminal Process, is printed herein as Appendix F.

JURISDICTION

The judgment of the Hamilton County, Ohio, Court of Common Pleas, was entered against Petitioner Woods on October 23, 1974, and against Petitioner Reaves on October 24, 1974, convicting each of Aggravated Murder, in violation of Revised Code of Ohio, Section 2903.01. The Court of Appeals for the First Appellate District of Ohio, Hamilton County, affirmed the conviction of Petitioner Woods on January 26, 1976, and the conviction of Petitioner Reaves on January 26, 1976, holding that the Ohio Death Penalty Scheme is not unconstitutional.

The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1257 and 2101 and Part V of the Rules of this Court.

QUESTIONS PRESENTED

The constitutional questions to be presented by this Writ of Certiorari were presented to the Hamilton County Court of Common Pleas by written pre-trial motions to

dismiss, which issues were preserved at each appropriate stage, during Appellate Review and before the Supreme Court of Ohio, and those questions are:

I. Whether Ohio's statutory framework for the imposition of Capital Punishment (Revised Code, Sections 2929.03 and 2929.04) is constitutional and does not impose cruel and unusual punishment within the meaning of the Eighth Amendment of the United States Constitution.

II. Whether Ohio's Death-Sentence Scheme is unconstitutional considering the illusory nature of some of the specified mitigating factors, the narrow scope of what remains and the irrelevance of non-specified factors.

III. Whether Ohio's system of denying a jury to and requiring a Defendant to prove by a preponderance of the evidence that he should not be executed violates due Process of Law under the Constitution of the United States.

IV. Whether Ohio's absence of a system of Appellate Review of all death sentences, which includes a comparison of case by case facts to insure that a death sentence in a particular case is warranted, is violative of the Eighth Amendment of the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Eighth Amendment of the Constitution of the United States and Sections 2939.03 and 2929.04 Revised Code of Ohio, are set forth in Appendix G herein.

STATEMENT OF THE CASE

On July 17, 1974, at approximately 12:40 a.m. o'clock, on-duty uniformed Cincinnati Police Officer, David Cole, then operating a marked police vehicle, responded to a location known as 2373 Florence Avenue, Cincinnati, Ohio, pursuant to a Police Radio Transmission, to investigate a man on the roof of a business premises. At 2316 Florence Avenue, Patrolman Cole encountered Petitioners. A volley of gunfire was heard by other arriving officers and Patrolman Cole was subsequently found, in the street area, mortally wounded by both .38 and .22 caliber projectiles. The Hamilton County, Ohio, Grand Jury, on July 19, 1974, returned its Indictment against Petitioners, charging them with Aggravated Murder with Specifications of Aggravation. Pre-Trial Motions to dismiss on the grounds of death penalty statute unconstitutionality were filed, argued and denied. Severance for trial was ordered, and the jury impaneled to try Petitioner Reaves returned its guilty as charged verdict on October 24, 1974. Petitioner Woods, electing to be tried by a three (3) judge Court, was adjudged guilty as charged on October 23, 1974. Pre-Sentence investigation and report and psychiatric examinations were ordered and following a finding in each case of no mitigating circumstances, Petitioners were sentenced to death in the electric chair.

The Court of Appeals for the First Appellate District of Ohio, Hamilton County, affirmed the lower Court by decision in each case, rejecting Petitioners claim that the Ohio Death Penalty Scheme is repugnant to the Constitution (Appendix D).

On December 1, 1976, the Supreme Court of Ohio entered its Opinion, concluding, as it had held on November 24, 1976, in that cause entitled *State* v. *Bayless*, reported in 48 Ohio St. 2d 73, 357 N.E. 2d 1035, that Ohio statutory framework for the imposition of Capital Punishment is constitutional and does not impose cruel and unusual punishment within the meaning of the Eighth Amendment of the Constitution of the United States (Appendix A).

REASONS FOR GRANTING WRIT

This case involves grave and substantial constitutional issues concerning the power of the State to determine who is and who is not eligible for death. The Ohio Legislative attempt to define and describe who shall be chosen to die and who shall live falls far short of this Court's announced guidelines, and fails to satisfy and overcome constitutional objections. Ohio law is now born of the concept that two steps in the dark toward death are better than one, for the three (3) statutory, mitigating factors are illustory in nature, so narrow in scope as to be practically meaningless and place upon the Defendant the burden of proving by a preponderance of the evidence one, more or all of such factors if he is to escape execution. Petitioners are the victims of man's failure, inability or unwillingness to treat all men equally, for the Ohio Death Penalty Scheme has opened the flood gates of arbitrariness, authorizes and condones unguided and unrestricted discretion and contains no provision for a review which includes a comparison on a case by case basis of facts to insure that an imposed death sentence is warranted and justified.

I

Whether Ohio's statutory framework for the imposition of Capital Punishment (Revised Code Sections 2929.03 and 2929.04) is constitutional and does not impose cruel and unusual punishment within the meaning of the Eighth Amendment of the United States Constitution.

The rigid, regressive and harsh features of the Ohio Death Penalty Statutes are equal to those found constitutionally defective in *Woodson* v. *North Carolina,* 96 S.Ct. 2978, and *Roberts* v. *Louisiana,* 96 S.Ct. 3001. These statutes do not permit particularized consideration of the relevant aspects of the character and record of each convicted Defendant required by this Court. Rather, they concentrate upon and limit attention to certain aspects of just the alleged criminal conduct for resolution of the live or die decision. Ohio Defendants are now sentenced to die by a process of arbitrary selection that does not differ in any constitutionally significant respect from the selection-election process in vogue immediately prior to *Furman* v. *Georgia,* 408 U.S. 238. The Ohio Supreme Court disposed of Petitioner Reaves with a two (2) paragraph opinion, a total of sixteen and one-quarter (16¼) lines, just one hundred and thirty five (135) words. No consideration is given to nor mention made of the how or why Petitioner Reaves differed significantly or otherwise with any other condemned Defendant. Contemporary standards of decency dictate that loss of life deserves far more than what was accorded or awarded to Roland Reaves. The highest standards of accuracy and reliability are now required to insure that execution is the proper punishment in the cause under consideration. The Ohio Statutes permit and tolerate inaccuracies and allow unreliabilities as are hereinafter demonstrated.

II

Whether Ohio's Death-Sentence Scheme is unconstitutional considering the illusory nature of some of the specified mitigating factors, the narrow scope of what remains and the irrelevance of non-specified factors.

Revised Code of Ohio, Section 2929.04 (B) sets forth three (3) mitigating circumstances:

(1) The victim of the offense induced or facilitated it.

(2) It is unlikely that the offense would have been committed but for the fact that the offender was under duress, coercion or strong provocation.

(3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.

The first mitigating circumstance probably is limited to the mercy killing, for without a willing victim no consideration could ever be given to this circumstance. This is mitigation in name only, a legislative daydream, which first conjures up that mercy killer convicted of aggravated murder with specification and then finds him in that ghost-like position of proving he should not die because he killed out of mercy – his victim induced and facilitated his own death

The second mitigating circumstance is in two (2) parts:

a. That the offender had at the time of crime commission a psychosis or mental deficiency.

b. That the offense was *primarily* a product of this condition.

Psychosis and mental deficiency are clearly included in mental disease or defect, which reach and cover exculpation, not mitigation. In *State* v. *Staten,* 18 Ohio St. 2d 13, the Ohio Supreme Court announced its current rule:

> "One accused of criminal conduct is not responsible for such criminal conduct if, at the time of such conduct as a result of mental disease or defect, he does not have the capacity either to know the wrongfulness of his conduct or to conform his conduct to the requirements of the law."

Psychosis or mental deficiency is not, in and of itself, insanity in Ohio, but is such a part thereof that this mitigating circumstance cannot be distinguished from excuse for and avoidance of criminal responsibility.

Conviction of capital murder with specification where the defense is insanity which, of course, demands that the crime was primarily a product of the accused's mental condition, leaves no room for asserting mental condition as a mitigating factor because there is just no substantial difference between the Ohio definition of insanity and the psychosis or mental deficiency contained in this mitigating circumstance. Where a trial jury rejects the insanity defense, such verdict realistically rejects the mitigating circumstance. If the insanity evidence does not raise a reasonable doubt, it also fairly deprives the Defendant of any right to assert that the act was primarily the product of his psychosis or mental deficiency.

The final mitigating circumstance provides that if proved by the accused by a preponderance of the evidence, he was under duress, coercion or strong provocation without which it is unlikely that the offense would not have been committed, he shall be spared. Classic interpretation of duress and coercion is declared by the Ohio Supreme

Court in its opinion which ignored the available psychiatric evidence concerning Petitioner Woods, his absence of law enforcement and Court contact, his domination by and leading from others. While conceding that Petitioner Reaves was the "gun-wielding tough", the Ohio Court states, probably as a matter of law, that failure to take advantage of an opportunity to abandon or refrain from criminal action removes any claim of duress or coercion. This attitude and approach begs the obvious, for it is unlikely or impossible that those easily influenced, led, dominated or inherently weak will or could ever break from the strong and flee. The required pre-sentence, probation report concerning each Petitioner was not before, available to nor ever considered by the Ohio Supreme Court. All the Court reviewed and determined was that there was substantial evidence to support and justify the sentence of death as to each Petitioner. It cannot be denied that glaring, obvious differences exist in the sentence issues posed in the separate cases of Petitioner Reaves and Petitioner Woods. Thusly, this mitigating circumstance is so narrow, so confined and so restricted that it is valueless, worthless and a practical waste of time to pursue it.

III

Whether Ohio's system of denying a jury to and requiring a Defendant to prove by a preponderance of the evidence that he should not be executed violates due process of law under the Constitution of the United States.

The Ohio Court (Opinion, page 135) places upon the Defendant the burden of proving by a preponderance of the evidence, one or more of the mitigating circumstances to either the Trial Judge, if a jury trial was had, or to a three (3) Judge panel, where a jury was waived, before he can escape death. This proof standard and burden, so fixed, runs contrary to this Court's holdings in *In Re Winship*, 397 U.S. 358, and *Mullaney* v. *Wilbur*, 421 U.S. 684, each of which sought to improve the reliability of the fact determining process when major interests were at stake. Under Ohio's burden of proof requirement, a Defendant can be executed when the evidence indicates that it is as likely as not that he deserves to spend his life span confined. The rationale of *Winship* and *Mullaney* are, thusly, fully applicable to the Ohio system. The interest of all Defendants is transcendent, life itself, a far greater interest than what was involved in either *Winship* or *Mullaney*. Although the stigma of execution means nothing to the one executed, there can be no greater stigma for those who survive. By contrast, the State's interest is inconsequential. No question of erroneous exoneration is involved, for a conviction will result in a life sentence in any event. That the State, therefore, has an additional proof burden in a capital case and must prove a negative is of no consequence, as this Court so ruled in *Mullaney* (id. at 702). The failure to place upon the prosecution the obligation of proving beyond a reasonable doubt the absence of any mitigating circumstance before a death

sentence can be imposed, renders the Ohio Scheme unconstitutional.

The exclusion of a jury's vote from the sentencing process deprives a Defendant of the right to have society itself voice its feelings concerning his acts. Juries were designed to make findings of the kind set forth in Ohio's three (3) mitigating circumstances, which are factual determinations not basic to guilt or innocence, but revolving about the degree and severity of criminal culpability. *Mullaney* v. *Wilbur*, 421 U.S. 684, holds that where the determination of certain factors is of crucial importance where it "may be of greater importance than the difference between guilt or innocence for many lesser crimes", the State may not lessen the standards by which those factors must be proved by "characterizing them as factors that bear solely on the extent of punishment". The difference between death and a life sentence is just about as crucially significant as anything in human experience, and as noted in *United States* v. *Kramer*, 289 Fed. 2d 909, where an aggravating circumstance is not

> "an element of the crime but rather a fact going only to the degree of punishment"

and where the presence of the aggravating circumstance substantially increases the severity of possible sentencing consequences, it must be assumed that

> "the Sixth Amendment entitles a Defendant to have that fact determined by the jury rather than by the sentencing Judge".

The Kramer principle is just as valid and forceful in the case of mitigating factors which are critical to sentence.

IV

Whether Ohio's absence of a system of Appellate Review of all death sentences, which includes an actual and complete comparison of case by case facts to insure that a death sentence in a particular case is warranted, is violative of the Eighth Amendment of the United States Constitution.

In *Proffitt* v. *Florida,* 96 S.Ct. 2967, the facts reflected that the Florida Supreme Court had set aside the death sentence in 40% of the cases it considered (pp. 2969-70), and to date, the Ohio Supreme Court has affirmed seventeen (17) of eighteen (18) death sentences, reversing one conviction only for evidentiary error unrelated to sentence. As far as Petitioners can ascertain, Ohio has not compared any one death case with any other death cases, and has announced no rule or procedure for obtaining information about cases in which the Trial Judge found that mitigating circumstances existed and the death penalty was not imposed. In the first death penalty case to reach the Ohio Supreme Court, *State* v. *Bayless,* 48 Ohio St. 2d 73, 357 N.E. 2d 1035, the Court held that it possesses the authority to review death sentences and, while probably it does, the issue now is whether or not the Ohio Court has ever reviewed adequately a death sentence by comparing it with any other death sentence to insure that it is proportionate to the sentence imposed in the similar case. Petitioners can find nothing to indicate that adequate sentence comparison exists in Ohio. Assurance against disproportionality is required in *Jurek* v. *Texas,* 96 S.Ct. 2950, which also demands consideration of not only the detailed facts of each case, but the life and character of the offender and how he may or does differ from other convicted capital murderers. In Ohio,

one convicted of aggravated murder and sentenced to death does become a member "of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death". *Woodson* v. *North Carolina,* 96 S.Ct. 2978. If he dies, he does so without constitutional approval.

CONCLUSION

For the reasons herein contained, certiorari should be granted.

Respectfully submitted,

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APPENDIX A

SUPREME COURT OF OHIO

THE STATE OF OHIO,

Appellee,

v.

WOODS,

Appellant.

THE STATE OF OHIO,

Appellee,

v.

REAVES,

Appellant.

[Cite as State v. Woods (1976), 48 Ohio St 2d 127.]

Criminal law – Aggravated murder – Imposition of death penalty – Constitutionality – Specifications – R.C. 2923.02 (A) – "Criminal attempt" proved, when – Mitigation of death sentence – R.C. 2929.04 (B), construed – Duress or coercion established, how.

1. A "criminal attempt" is when one purposely does or omits to do anything which is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime. To constitute a substantial step, the conduct must be strongly corroborative of the actor's criminal purpose. (R. C. 2923.02[A] construed.)

2. Within the meaning of the standard for mitigation of the death sentence for aggravated murder in R. C. 2929.04 (B), duress or coercion may be established by proof that force, threat of force, strong persuasion or domination by another, necessitous circumstances, or some combination of these, has overcome the mind or volition of the defendant so that he acted other than he ordinarily would have acted in the absence of those influences.

(Nos. 76-137 and 76-155—Decided December 1, 1976.)

APPEALS from the Court of Appeals for Hamilton County.

Shortly after midnight on July 17, 1974, the Cincinnati police received a telephone call from a woman who said that she had seen a man of the roof of the United Dairy Farmers store at 2373 Florence Avenue in Cincinnati. That information was broadcast to patrol cars in the area and several officers responded. One of the officers, Patrolman Terry Kramer, observed two men looking over their shoulders while walking on Florence Avenue in the vicinity of the store, and he reported that information over the police radio. Another officer, Patrolman David Cole, also responded to the broadcast and was approaching the scene along Florence Avenue.

Just after he made his broadcast, Patrolman Kramer heard a series of gunshots. Other officers also heard the shots and came to the scene. Patrolman Cole was lying in the street at the rear of his cruiser, dying from multiple gunshot wounds. Cole was pronounced dead on arrival at the hospital, and the subsequent autopsy and ballistics examination disclosed that he had been shot by both a .22 and a .38 caliber weapon.

Ronald Reaves, the defendant in case No. 76-155, was arrested on July 18, 1974, in Cincinnati and subsequently made statements to investigating officers which implicated Ricardo Woods, the defendant in case No. 76-137. Woods was arrested on July 19, 1974, in West Virginia at the home of his mother. After the arrival of Cincinnati police, Woods made a complete statement as to his part in the events leading up to and following the homicide.

Both defendants were charged with multiple counts of aggravated murder with specifications. Reaves was tried before a jury, and Woods before a three-judge panel. The evidence presented at the two trials was virtually identical. It established that Woods had been living with Reaves' sister for some time and had recently been laid off from his construction job. Woods and Reaves met for the first time, about two weeks before the killing, when Reaves came to Cincinnati from Chicago. Woods state that on July 16, he and Reaves agreed that they needed money, and, using Woods' unemployment check as funds, Reaves negotiated the purchase of a .38 caliber revolver, which Reaves told the seller he planned to use to rob a loan company. Later, around midnight, Reaves, accompanied by Woods, parked his car close to the United Dairy Farmers store, and both men began to "case" the store. According to Woods' statement, they could see the store manager inside. The plan was to wait until the manager came out and to "hold him up and take the money." Reaves had the .38 caliber revolver and Woods had a .22 caliber pistol which Reaves had brought from Chicago. Reaves then left Woods as a lookout across the street, and climbed onto the roof of the store.

Reaves descended from the roof and joined Woods who said that "things looked funny." Apparently, they had heard the sirens of a fire department unit making a run

nearby. Woods and Reaves were walking away from the store and down Florence Avenue when Patrolman Cole skidded to a stop near the curb. Woods stated that he leaned in the front passenger window of the police cruiser to talk to Cole just as the officer was getting out on the opposite side of the car, and that when Cole got to the rear of the cruiser, Reaves began to fire at him, the first bullet striking Cole in the chest. Reaves fired three or four times, and Woods also shot at Cole, who at that time was lying on the street, as he and Reaves fleld the scene. Cole fired four shots without hitting the fleeing men.

The pair ran to the house of a friend nearby, changed clothes, and drove away in the friend's car. Woods left the next morning for his mother's home in West Virginia.

At their separate trials, Reaves and Woods were each found guilty of aggravated murder, under a count in the indictment charging that they had purposely caused the death of Patrolman Cole while fleeing immediately after attempting to commit aggravated robbery, and guilty of the second specification, that at the time of the offense the victim was a law-enforcement officer whom they knew to be such, and who at the time was engaged in his duties. Following mitigation hearings, both defendants were sentenced to death. The Court of Appeals affirmed both judgments in separate opinions, and the causes are now before this court as a matter of right.

Mr. Simon L. Leis, Jr., prosecuting attorney, *Mr. Fred J. Cartolano, Mr. Robert R. Hastings, Jr.*, and *Mr. Merlyn Shiverdecker*, for appellee.

Mr. Jack C. Rubenstein and *Mr. Harry H. McIllwain*, for appellant Woods.

Messrs. Gilday, Jung & Gilday, Mr. Bernard J. Gilday, Jr., and Mr. D. Shannon Smith, for appellant Reaves.

I

STERN, J. In case No. 76-155, appellant Reaves raises three propositions of law. Two of these assert that Ohio's constitutional scheme for imposition of the death penalty is unconstitutional. That issue was decided by this court in *State* v. *Bayless* (1976), 48 Ohio St. 2d 73, and need not be reconsidered here. Those propositions of law are overruled.

Appellant also claims error in the prosecution's inquiry upon *voir dire* into veniremen's opposition to capital punishment. Three prospective jurors were excused because of their opinions on capital punishment, and the record shows that each answered definitely that he could not join in a guilty verdict if the result was that the defendant might be sentenced to death. This court finds that no error was committed in excusing them as persons "otherwise unsuitable for any other cause to serve as a juror." Crim. R. 24 (B) (14); *State* v. *Bayless, supra.*

II

In case No. 76-137, appellant Woods raises similar claims relating to the constitutionality of Ohio's death penalty statutes and also contends that the evidence was insufficient to prove an attempted robbery, or, in the alternative, that the defense had proved an abandonment of the offense, and that the charge of aggravated murder against Woods should accordingly have been reduced to murder.

There is no serious dispute concerning the facts of this case. Defendants Reaves and Woods decided to rob the manager of the United Dairy Farmers store by accosting him as he came out with the day's receipts; they "cased" the premises; Reaves climbed onto the roof, while Woods

stayed behind as a lookout; Reaves then climbed back down, apparently having heard the nearby fire engine siren; and Reaves and Woods then walked away, leaving Reaves' car behind.

R.C. 2923.02 (A) provides that: "No person, purposely or knowingly, and when purpose or knowledge is sufficient culpability for the commission of an offense, shall engage in conduct which, if successful, would constitute or result in the offense."

The committee comment for this section states, in part, that: "In order to prove an attempt to commit an offense, it must be shown that particular conduct directed toward commission of the offense took place and that such conduct, if successful, would constitute or result in the offense. • • •" This language establishes that the essential elements of a criminal attempt are the *mens rea* of purpose or knowledge, and conduct directed toward the commission of an offense. The statute does not, however, indicate how far this conduct must proceed toward the actual consummation of the crime in order to be considered an attempt to commit that crime. There is also little case law in Ohio on this question, although this court has held that the conduct necessary for a criminal attempt "need not be the last proximate act prior to the consummation of the felony." *State* v. *Farmer* (1951), 156 Ohio St. 214, 216, 102 N. E. 2d 11; *Fox* v. *State* (1878), 34 Ohio St. 377. In *Farmer*, an assault with intent to rob was held, at page 217, "sufficient to justify the triers of the facts in determining beyond a reasonable doubt that the action of the defendant at the time of • • • [an] altercation was action taken to carry out that intent and therefore amounted to an attempt to perpetrate robbery." In this case, Reaves committed no assault, and the question arises as to whether his acts nevertheless amounted to an attempt to rob.

American courts have generally agreed that intent to commit a crime does not of itself constitute an attempt, nor does mere preparation. The difficulty is to formulate a standard that excludes preparations prior to an actual attempt to commit a crime, while including, as punishable, those acts which are so dangerously close to resulting in a crime that intervention and arrest by the police are justified, even before the "last proximate act." Various tests have been suggested and followed in other jurisdictions. There is a good discussion of this problem and the various approaches in Wechsler, Jones and Korn, The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy. 61 Columbia L. Rev. 571, 573-621. It is not necessary to consider each of the alternative approaches here. Ohio's statutory definitions of criminal offenses is the Revised Code are based largely upon the American Law Institute's Model Penal Code, and the standard adopted in the latter Code appears to us workable, reasonable, and consistent with the language of R.C. 2923.02 (A). Under Section 5.01 of the Model Penal Code, an attempt is when one "purposely does or omits to do anything which is • • • an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime." To constitute a "substantial step," the conduct must be "strongly corroborative of the actor's criminal purpose." The application of this standard will of course depend upon both the nature of the intended crime and the facts of the particular case. A substantial step in the commission of a robbery may be quite different from that in arson, rape, or some other crime. But this standard does properly direct attention to overt acts of the defendant which convincingly demonstrate a firm purpose to commit a crime, while allowing police intervention, based upon ob-

servation of such incriminating conduct, in order to prevent the crime when the criminal intent becomes apparent.

Reaves' act of climbing onto the store roof with a gun, apparently to lie in wait for the store manager, was plainly a substantial step in the planned robbery, and certainly was strongly corroborative of the criminal purpose. We find no error in the trial court's holding that this conduct could constitute attempted robbery, or in the verdict of the three-judge panel that the defendant Woods was guilty beyond a reasonable doubt.

There was also sufficient evidence from which to conclude that the defendants had not "completely and voluntarily" renounced their criminal purpose. Abandoning an attempt out of fear that the police might be coming cannot reasonably be considered voluntary. Nor is it clear in this case that the attempt was completely abandoned, for the defendants left the car parked near the store and walked away, behavior from which a jury might properly infer that they intended only to wait at a distance and observe whether the robbery might still be possible despite the siren they had heard.[1] We find no error in the guilty verdict rendered by the three-judge panel.

III

At the mitigation hearing held following appellant Woods' conviction, the defense argued that his sentence

[1] Cf., Model Penal Code, Section 501(4):

"• • • Within the meaning of this Article, renunciation of criminal purpose is not voluntary if it is motivated, in whole or in part, by circumstances, not present or apparent at the inception of the actor's course of conduct, which increase the probability of detection or apprehension or which make more difficult the accomplishment of the criminal purpose. Renunciation is not complete if it is motivated by a decision to postpone the criminal conduct until a more advantageous time or to transfer the criminal effort to another but similar objective or victim."

should be reduced to life imprisonment because it was "unlikely that the offense would have been committed, but for the fact that the offender was under duress [or] coercion • • •," R. C. 2929.04 (B) (2). The evidence presented at the trial and the mitigation hearing indicated that Reaves had been the dominant party in initiating, planning, and carrying out the crime. There was also evidence that Reaves had been involved in criminal gang activities in Chicago. According to Woods' testimony, Reaves bragged of his criminal past and owned a sawed-off shotgun with "initials" cut in the stock for men he had killed. Woods did not claim that he was actually threatened by Reaves, but did assert that he was intimidated by him, wished to back out of the planned robbery, and went along with it unwillingly only after Reaves placed the gun in his hands and told him that all he had to do was stay on the sidewalk and watch for the police. Woods testified that he was reluctant to stay, but that he was afraid of what Reaves might do because of his violent reputation, and that when they were walking away he was only going to talk to the policeman, but that Reaves pushed Woods back and started shooting. Woods said that he had shot at the policeman because he was scared. The examining psychiatrist testified that Woods had no prior record and had been an outstanding athlete in high school. The psychiatrist testified further that Woods was a person "dependent on other people's opinion and leadership," that he "would not offer much objection to being dominated or controlled," and that he probably would not have committed the crime if he had not been under duress, coercion, or strong provocation. Woods' parents also testified on his behalf.[2]

[2] One difficulty in considering the claims for mitigation in this case is that the pre-sentence report required to be made by statute does not appear in the record. This court bears a special responsibility

The question is whether this evidence was sufficient to justify mitigation of sentence. R. C. 2929.04 (B) provides that the death penalty:

"• • • is precluded when, considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of the following is established by a preponderance [*sic*] of the evidence:

"• • •

"2. It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation."

This language must be strictly construed against the state and liberally construed in favor of the accused. R. C. 2901.04 (A).

In construing and applying the words "duress" and "coercion," we must note first that those terms would be a virtual nullity if they were taken to apply to the legal standard for duress as a defense to a criminal charge.

In the case of the most common type of aggravated murder, purposely causing death in connection with certain felonies, if the defendant has a valid defense of duress to the underlying crime, he can, at most, be convicted of the murder itself, not of aggravated murder, and he would not then be subject to the death penalty.[3] Accordingly, to have

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in capital cases to assure that the ultimate penalty of death be imposed fairly and consistently, and that responsibility requires that we independently evaluate the evidence of aggravation and mitigation upon which each death sentence is based. For that reason, pre-sentence reports and other information relevant to the appropriateness of the death sentence should properly be included in the record of each case brought to this court as a matter of right because the appellant's sentence of death has been affirmed by the Court of Appeals.

[3] There is strong precedent for holding that duress is not a defense to murder, but that question has not been decided in Ohio. At common law, no person can excuse himself for taking the life of an innocent person on the grounds of duress. *Arp* v. *State* (1893), 97 Ala. 5, 12 So. 301; *Watson* v. *State* (1951), 212 Miss. 788, 55 So. 2d 441; *State* v. *Weston* (1923), 109 Ore. 19, 219 P. 180; *State* v. *Nargashian* (1904), 26 R. I. 299, 58 A. 953; *Leach* v. *State* (1897), 99 Tenn. 584, 42 S. W. 195. This rule has been modified by statute in some states. *Jones* v. *State* (1950), 207 Ga. 379, 62 S. E. 2d 187; *Paris* v. *State* (1895), 35 Tex. Crim. 82, 31 S. W. 855.

any effective meaning, the terms "duress" and "coercion" in R. C. 2929.04 (B) must be construed, if possible, more broadly than when used as a defense in criminal cases. This is particularly true since the defendant is required to establish duress or coercion by a preponderance of the evidence for purposes of mitigation, whereas during trial he is required only to present evidence sufficient to raise such an affirmative defense, and the burden of disproving it beyond a reasonable doubt remains with the prosecution. *State* v. *Robinson* (1976), 47 Ohio St. 2d 103, 351 N. E. 2d 88.

The concepts of duress and coercion are also found in civil law and have broader meaning. The application of those concepts varies greatly, and turns largely upon the circumstances of each individual case, including the character of the one sought to be influenced. As this court held in *Tallmadge* v. *Robinson* (1952), 158 Ohio St. 333, 109 N. E. 2d 496, paragraph two of the syllabus:

"In determining whether a course of conduct results in duress, the question is not what effect such conduct would have upon an ordinary man but rather the effect upon the particular person toward whom such conduct is directed, and in determining such effect the age, sex, health and mental condition of the person affected, the relationship of the parties and all the surrounding circumstances may be considered."

Duress usually connotes some degree of force or threat of force, but duress has also been found when the conduct of one person induces another to enter into a contract against

his own volition or judgment, generally out of fear, but also in some cases because of extreme persuasion or pressure of circumstances. 13 Williston on Contracts (3 Ed.), Section 1608. Coercion is generally defined more broadly to include undue influence and other lesser forms of compulsion. It has been said that:

"The words 'coercion' and 'duress' are not synonymous, although their meanings often shade into one another. 'Duress' generally carries the idea of compulsion, either by means of actual physical force or threatened physical force applied to the person (or to some near relative of the person) to be influenced, or applied to the property or reputation of such person. 'Coercion' may include a compulsion brought about by moral force or in some other manner with or without physical force." *McKenzie-Hague Co.* v. *Carbide & Carbon Chemicals Corp.* (C. A. 8, 1934), 73 F. 2d 78, 82. Coercion has been found in a wife's refusal to return to her husband and resume marital relations (*Campbell* v. *Prater* [1948], 64 Wyo. 293, 191 P. 2d 160), and in an employer's warning to striking workers that if they did not return to work by a certain day their jobs would be filled (*N. L. R. B.* v. *Montgomery Ward & Co.* [C. A. 9, 1943], 133 F. 2d 676).

These judicial definitions of coercion correspond to the common use of the word. Webster's Third New International Dictionary defines coercion as "the act of coercing: use of physical or moral force to compel to act or assent," and to coerce as "to restrain, control or dominate, nullifying individual will or desire (as by force, power, violence, or intimidation)."

The essential characteristic of coercion which emerges from these definitions is that force, threat of force, strong persuasion or domination by another, necessitous circumstances, or some combination of those, has overcome the

mind or volition of the defendant so that he acted other than he ordinarily would have acted in the absence of those influences.

This definition appropriately allows consideration of the broad range of information relevant to mitigation set out in R. C. 2929.04, including "the nature and circumstances of the offense and the history, character, and condition of the offender." It also corresponds, as well perhaps as any definition, to the essential purpose of any hearing upon mitigation. The question at that stage is not guilt, for guilt has already been determined. Nor is it primarily whether the standards of conduct imposed by the criminal law have been upheld in order to express society's disapproval of the criminal act and to deter others, for those goals too are largely accomplished by the verdict. Rather, the purpose of mitigation is to recognize that the punishment assigned for a criminal act may, for ethical and humanitarian reasons, be tempered out of consideration of the individual offender and his crime. As the United States Supreme Court has said: "• • • The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender. This whole country has traveled far from the period in which the death sentence was an automatic and commonplace result of convictions • • •." *Williams* v. *New York* (1949), 337 U. S. 241, 247.

Construing R. C. 2929.04 (B) liberally in favor of the accused, we think that the standard stated is appropriate for the trial judge or judges to apply to the facts presented at the mitigation hearing, including the nature and circumstances of the offense and the history, character and condition of the defendant, in making the determination of whether a sentence of death should be reduced to life imprisonment because of duress or coercion.

In the present case, the evidence establishes a consistent portrait of Woods as a young man with no previous criminal record but one who was easily led and who came under the influence of Reaves, the brother of the woman he was living with. It appears likely that it was the influence of Reaves which persuaded Woods to agree to participate in a robbery, to acquiesce and cooperate in the purchase of the gun, and to remain at the scene of the attempted robbery despite his reluctance. All of these are factors which favor the granting of mitigation. Yet the hard fact remains that when the opportunity to abandon the robbery, to surrender to the police, to flee, or even to refrain from firing, was presented, Woods nevertheless opened fire on the wounded officer, despite the fact that Woods was not ordered or even urged to do so. In committing that act, for which punishment under law must now be set, defendant Woods was under neither coercion nor duress, and we can accordingly find no grounds for reducing the sentence of death imposed upon him.

IV

The judgments of the Court of Appeals in 76-155, *State* v. *Reaves*, and 76-137, *State* v. *Woods*, are affirmed.

Judgments affirmed.

O'NEILL, C. J., HERBERT, CORRIGAN, CELEBREZZE, W. BROWN and P. BROWN, JJ., concur.

APPENDIX B

THE SUPREME COURT OF THE STATE OF OHIO

1976 TERM

To wit: December 1, 1976

No. 76-137

THE STATE OF OHIO,)
)
City of Columbus.)

THE STATE OF OHIO,

Appellee,

vs.

RICARDO WOODS,

Appellant.

MANDATE

To the Honorable COMMON PLEAS COURT

Within and for the County of HAMILTON. Ohio, Greeting:

The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this cause into execution:

Judgment of the Court of Appeals affirmed for the reasons set forth in the opinion rendered herein. It is further ordered that the execution date be set for Monday, January 31, 1977.

THOMAS L. STARTZMAN,
Clerk

• • •

RECORD OF COSTS

Docket Fee ..... $ ..... Paid by Affidavit of Poverty

• • •

THE SUPREME COURT OF THE
STATE OF OHIO

1976 TERM

To wit: December 22, 1976

No. 76-137

THE STATE OF OHIO,)
)
City of Columbus.)

THE STATE OF OHIO,
Appellee,

vs.

RICARDO WOODS,
Appellant.

REHEARING

It is ordered by the court that rehearing in this case is denied.

I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to with, from Journal No. ..... Page .....

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 22nd day of December, 1976.

THOMAS L. STARTZMAN, Clerk.

• • •

THE SUPREME COURT OF THE
STATE OF OHIO

1976 TERM

To wit: December 1, 1976

No. 76-155

THE STATE OF OHIO,)
)
City of Columbus.)

THE STATE OF OHIO,

Appellee,

vs.

RONALD A. REAVES,

Appellant.

MANDATE

To the Honorable COMMON PLEAS COURT

Within and for the County of HAMILTON, Ohio, Greeting:

The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this cause into execution:

Judgment of the Court of Appeals affirmed for the reasons set forth in the opinion rendered herein. It is further

ordered that the execution date be set for Tuesday, February 1, 1977.

THOMAS L. STARTZMAN,
Clerk

• • •

RECORD OF COSTS

Docket Fee ..... $..... Paid by Affidavit of Poverty

• • •

THE SUPREME COURT OF THE
STATE OF OHIO

1976 TERM

To wit: December 22, 1976

No. 76-155

THE STATE OF OHIO,)
)
City of Columbus.)

THE STATE OF OHIO,

Appellee,

vs.

RONALD A. REAVES,

Appellant.

REHEARING

It is ordered by the court that rehearing in this case is denied.

I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No. ..... Page .....

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 22nd day of December, 1976.

THOMAS L. STARTZMAN, Clerk.

• • •

APPENDIX C

THE SUPREME COURT OF THE
STATE OF OHIO

1976 TERM

To wit: December 29, 1976

No. 76-137

THE STATE OF OHIO,)
)
City of Columbus.)

STATE OF OHIO,

Appellee,

vs.

RICARDO WOODS,

Appellant.

ENTRY
(HAMILTON COUNTY)

Upon consideration of the motion, filed by counsel for appellant, to stay execution of sentence pending the timely filing of an appeal to the Supreme Court of the United States, it is therefore

ORDERED that execution of sentence be, and the same hereby is, stayed, pending the timely filing of an appeal to the Supreme Court of the United States.

It is further ORDERED that if a timely notice of appeal is filed to the Supreme Court of the United States, this stay will automatically continue pending final determination of the appeal by that Court.

It is further ORDERED that the Clerk of this Court shall forthwith send a certified copy of this Stay of Execution to the Superintendent of the Southern Ohio Correctional Facility, who shall acknowledge receipt thereof.

/s/ C. WILLIAM O'NEILL
CHIEF JUSTICE

I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No. ..... Page .....

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 29th day of December, 1976.

THOMAS L. STARTZMAN, Clerk.
By /s/ SAM F. JENKINS, Deputy.

THE SUPREME COURT OF THE STATE OF OHIO

1976 TERM

To wit: December 29, 1976

No. 76-155

THE STATE OF OHIO,)
)
City of Columbus,)

THE STATE OF OHIO,
Appellee,
vs.
ROLAND A. REAVES,
Appellant.

ENTRY
(HAMILTON COUNTY)

Upon consideration of the motion, filed by counsel for appellant, to stay execution of sentence pending the timely filing of an appeal to the Supreme Court of the United States, it is therefore

ORDERED that execution of sentence be, and the same hereby is, stayed pending the timely filing of an appeal to the Supreme Court of the United States.

It is further ORDERED that if a timely notice of appeal is filed to the Supreme Court of the United States,

this stay will automatically continue pending final determination of the appeal by that Court.

It is further ORDERED that the Clerk of this Court shall forthwith send a certified copy of this Stay of Execution to the Superintendent of the Southern Ohio Correctional Facility, who shall acknowledge receipt thereof.

/s/ C. WILLIAM O'NEILL
CHIEF JUSTICE

I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No. ..... Page .....

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 29th day of December, 1976.

THOMAS L. STARTZMAN, Clerk.
By /s/ SAM F. JENKINS, Deputy.

APPENDIX D

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

NO. C-75047

STATE OF OHIO,
Plaintiff-Appellee,
vs.
RICARDO WOODS,
Defendant-Appellant.

OPINION
(Filed January 26, 1976)

**Appeal From The Court of Common Pleas
Hamilton County, Ohio**

Messrs. Simon L. Leis, Jr., Robert R. Hastings, Jr., and Merlyn Shiverdecker, 420 Hamilton County Court House, Court and Main Streets, Cincinnati, Ohio 45202, for Plaintiff-Appellee,

Messrs. Jack C. Rubenstein, 609 Atlas Bank Building, Cincinnati, Ohio 45202, and Harry H. McIllwain, 805 Atlas Bank Building, Cincinnati, Ohio 45202, for Defendant-Appellant.

SHANNON, P. J.

This cause came on to be heard upon the appeal, the

transcript of the docket and journal entries and original papers from the Court of Common Pleas of Hamilton County, the transcript of the proceedings, the assignments of error, the briefs of counsel and amicus curiae and the arguments of counsel.

The defendant-appellant, Ricardo Woods, was convicted of the crime of aggravated murder and an appropriate specification set forth in the indictment by a three judge panel established after he had waived trial by jury. The same panel on a later date found that the defendant-appellant had failed to demonstrate any of the mitigating circumstances prescribed by Section 2929.04 (B), O.R.C. and accordingly sentenced him to death. One Roland Reaves was indicted jointly with the defendant-appellant, but was tried separately to a jury which found him to be guilty of aggravated murder and the pertinent specification. Subsequently, it was determined that Reaves had failed to establish mitigating circumstances and he, too, was sentenced to death.

This is an appeal timely taken from the judgment and sentences imposed upon the defendant-appellant, Ricardo Woods.

Conviction of the defendant-appellant was had on the second count of the indictment which alleged, inter alia:

> ". . . that Roland A. Reaves and Ricardo A. Woods on or about the seventeenth day of July in the year nineteen hundred and seventy four at the County of Hamilton and State of Ohio . . . purposely caused the death of David L. Cole while the said Roland A. Reaves and Ricardo A. Woods were fleeing immediately after attempting to commit Aggravated Robbery, in violation of Section 2903.01 Revised Code of Ohio."

Shortly after midnight on July 17, 1974, the Cincinnati Police received a telephone call from a citizen advising that

a man was on the roof of the United Dairy Farmers store at 2373 Florence Avenue, Cincinnati, Hamilton County, Ohio. The police then broadcast that information and officers responded. One of the officers, Patrolman Kramer, observed two men walking on Florence Avenue in the vicinity of the store looking over their shoulders, and he used his police radio to convey that information to fellow officers. Another officer, Patrolman David Cole, was also responding to the scene and approaching it on Florence Avenue.

Just after he made his broadcast, Officer Kramer heard a series of gunshots. Other police enroute to the store also heard the burst of gunfire and one of them, Patrolman Sizemore, saw Patrolman Cole's police car stopped near the curbing of the street. Sizemore stopped his vehicle, ran to Cole's aid and found Cole's body prone at the rear of the cruiser. Cole had been shot and Sizemore was unable to obtain any response to his efforts to get Cole to talk. Cole was transported to a hospital where he was pronounced dead on arrival. Ultimately, the cause of death was determined to have been internal hemorrage resulting from multiple gunshot wounds to Cole's head, chest and body.

Ronald Reaves was arrested on July 18, 1974, in Cincinnati and subsequently made a statement to investigating police which implicated Ricardo Woods. Woods was arrested on July 19, 1974, in West Virginia at the home of his mother.

After his arrest, Woods told police that he had been living with a sister of Roland Reaves for some time prior to the time of the homicide, and that Reaves had been staying with them for about two weeks. Woods stated that on July 16, 1974, he and Reaves agreed that they needed money and, using funds obtained by cashing a check for

unemployment compensation belonging to Woods, they bought a gun which Reaves told the seller he planned to use to rob a loan company. Just before midnight the same evening, Woods stated that he and Reaves parked Reaves' car close to the United Dairy Farmers store and began to "case" it; that they could see the store manager, who was adding up the day's receipts preparatory to making up a bank deposit, inside; that he (Woods) was armed with a .22 caliber pistol while Reaves had the .38 caliber handgun purchased earlier; that they planned to wait until the manager came out to take the money; and that he was watching the store from a bus stop across the street while Reaves was on the roof of the building.

Reaves came down from the roof and joined Woods, who said "things looked funny." Just at that moment, the fire department was making a run apparently nearby and sounding sirens. Woods and Reaves were walking away from the store and had reached a point about 800 feet distant when Patrolman Cole stopped his car. Woods stated that he leaned in the front window of the police cruiser to talk to Cole just as the officer was getting out on the opposite side of the car; that when Cole got to the rear of the cruiser Reaves began to fire at him, the first bullet striking Cole in the chest; that Reaves fired three or four times; that he (Woods) then shot at Cole who at that time was prone on the street, bleeding, and that as he and Reaves fled the scene, Cole fired three times at them. The post mortem examination of Cole's body disclosed that he had been struck by bullets from both guns.

In his statement, Woods detailed the path taken in their flight and described the clothing into which they changed. He told police that he left Cincinnati for West Virginia before noon on July 17, 1974, but that Reaves had decided to remain in the city.

Four errors have been assigned by appellant, two of which relate to the state of the evidence, while the remainder address themselves to constitutional issues. The first assignment of error, as phrased by appellant, is:

> "A defendant may not be convicted of aggravated murder when the state fails tc prove that the homicide occurred during the commission of an attempted aggravated robbery. Where the evidence is insufficient to prove an attempted aggravated robbery the charge must be reduced to murder."

These contentions were among those advanced by appellant in a motion for acquittal made below after the prosecution had rested its case in chief. That motion was partially successful in that the court granted it as it pertained to the first and third counts of the indictment. The court overruled the motion as it was addressed to the second count and second specification and it is to such rejection that the assignment refers in substance, though not in form.

Here, in presenting his argument supportive of the assignment, the appellant concedes that he and Reaves intended to commit a robbery at the United Dairy Farmers store, but asserts that the evidence adduced by the prosecution fails to establish any "overt act" committeed by either of them "directed toward the consummation of their criminal designs." Appellant submits that his viewing of the store premises from his vantage point across the street and Reaves' activities on the roof were "equivocal" acts "performed in the preparation of the crime" and therefore did not suffice as proof of an attempt to commit armed robbery.

Appellant makes no effort to temper the proof by the prosecution that David L. Cole was killed purposely, relying instead upon the contention that the homicide was

not committed while the murderers were in flight from an attempted armed robbery.

In enacting chapter 2911, O.R.C., (effective January 1, 1974), the Ohio legislature expanded the concept and coverage of antecedent robbery statutes. Consequently, section 2911.01, O.R.C., which defines aggravated robbery, provides in material part that:

> "(A) No person, in attempting or committing a theft offense as defined in section 2913.01 of the Revised Code, *or in fleeing immediately after such attempt* or offense, shall . . .
>
> (1) Have a deadly weapon . . . as defined in section 2923.11 of the Revised Code on or about his person or under his control;" (Emphasis ours).

Section 2913.01 (K) (1), O.R.C., declares aggravated robbery to be a theft offense, and both the .38 and the .22 caliber pistols carried by Reaves and Woods were deadly weapons by statutory definition, projectiles from which took the life of Officer Cole.

The sole question, then, is whether at the time of the homicide this appellant and his companion were fleeing from an attempted aggravated robbery.

As to the sufficiency of evidence with respect to the element of "fleeing," see our comments *infra* under the second assignment of error; as to whether the foregoing facts were sufficient to constitute an "atempted aggravated robbery," we note Section 2923.02 (A), O.R.C., which provides that:

> "No person, purposely or knowingly, . . . shall engage in conduct which, if successful, would . . . result in the offense."

After considering this statute in light of the totality of the evidence, we are convinced that the activities of the

appellant and his companion constituted an attempt to commit aggravated robbery.

Admittedly, Woods and Reaves planned to commit a robbery and bought a weapon specifically for use in such a crime. Together, they went to the United Dairy Farmers store and engaged in reconnaissance of the surrounding area. Each took a position which would enable him to carry out his plan to rob the manager as he left the store. They were armed and ready in all respects to complete their scheme. The final step, save for the intervening events, would have been for them to have shoved their guns into the belly of the manager in an effort to take from him the money they knew he would be carrying.

Must that final step have been taken before it could be said that Woods and Reaves were guilty of attempting to commit an aggravated robbery? We think not.

In reaching the conclusion that the prosecution had adduced evidence sufficient to establish an attempt to commit aggravated robbery, we are aided by the opinion in *State* v. *Farmer* (1951), 156 Ohio St. 214. There, Justice Taft restated an observation made in *Fox* v. *State* (1878), 34 Ohio St. 377, at page 379:

> "It is quite clear that in an 'attempt' to commit an offense an 'intent' to cimmit it must be present; and it is equally clear that the presence of intent alone is not sufficient. There must be some concomitant act or movement toward the execution of the purpose."

In adopting that pronouncement from *Fox*, supra, Justice Taft added at page 216 of his opinion in *Farmer*, supra, that:

> ". . . the act necessary in an attempt to commit a felony need not be the last proximate act prior to the consummation of the felony intended to be perpetrated."

Consequently, we hold that the evidence considered in its totality satisfies the test prescribed by Section 2923.02 (A), O.R.C., as well as the antecedent tests established by case law. Woods and Reaves clearly had engaged in a series of acts or movements toward the execution of their plan to rob and, as we comprehend the law to be, the prosecution was not required to prove the last proximate act prior to the commission of the robbery, i.e., that a gun had been shoved in the belly of the manager and a demand made for his money.

There being sufficient proof of an attempted aggravated robbery, the panel was not constrained to reduce the charge, but was entitled to and did consider properly the charge of aggravated murder.

The first assignment of error is not well taken.

The second assignment of error is, like the first, stated as a proposition of law. It is given to us that:

> "Where a defendant proves by clear and convincing evidence that he abandoned his effort to commit an offense under circumstances manifesting a complete and voluntary renunciation of his criminal purpose, the defendant may not be tried for aggravated murder for a homicide committed thereafter."

In support of this assignment which, essentially, echoes the first, appellant argues that it is clear from the evidence that he and Reaves had voluntarily abandoned their criminal intent to commit aggravated robbery prior to the killing of David L. Cole and accordingly that he was entitled to have the charge against him reduced to murder on the ground that at the time of the homicide he was not in flight from an attempted aggravated robbery.

Section 2923.02 (D), O.R.C., provides that:

> "It is an affirmative defense to a charge under [Section 2923.02, O.R.C.] that the actor abandoned his effort to commit the offense or otherwise prevented its commission, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose."

Again we must disagree with appellant in his assessment of the weight of the evidence in this case. We do not believe that the panel erred in finding, as it obviously did, that appellant had failed to establish the affirmative defense afforded him by the statute.

We have recounted above the salient evidence which in our opinion established that Woods and Reaves were attempting to commit the aggravated robbery which had been planned and prepared for. To that litany, we add now the fact that the conspirators left the scene on foot without making an effort to return to Reaves' car parked next to the store. That automobile was retrieved sometime during the afternoon of July 17, 1974, by the man who had sold the .38 caliber pistol to Reaves, and then was returned to Reaves.

The statute requires expressly that the renunciation of the criminal purpose be voluntary. After review of all the evidence, we can not say that the finding by the triers of the facts, that the appellant had failed to establish that the abandonment of his criminal purpose and plan was voluntary, was contrary to the manifest weight of the evidence. We reiterate that we are convinced that the robbery was frustrated by a turn of events — that the conspirators did not abandon their criminal scheme because of remorse, a change of heart, repentence or otherwise voluntarily, but fled the scene because of alarm and fright. The attempt failed to ripen into an accom-

plishment only because of the intervening circumstances and the plan was not aborted by a decision reached independently of those factors. That being so, it follows that the rejection of the defense proffered was not contrary to law.

The second assignment of error is not well taken for the reasons set forth immediately above coupled with those given in our resolution of the first assignment of error.

The third and fourth assignments of error raise constitutional questions which we have considered and ruled upon in *State* v. *Reaves,* Hamilton County, Number C-75022 (1st Dist. Ct. of App., January 26, 1976), unreported.

These assignments of error are:

THIRD ASSIGNMENT OF ERROR

The provisions of Sections 2903.01, 2929.03 and 2929.-04, unconstitutionally permit arbitrary imposition of the death penalty in violation of the Eighth and Fourteenth Amendments to the Federal Constitution. Where an aggravated murder defendant is sentenced to death under Section 2903.03 (B) after a finding of guilt on the specification in Section 2929.04 (A) (7), that defendant has been convicted and sentenced under arbitrary and vague provisions of the new criminal code which do not differ in any constitutionally significant respect from the arbitrary selection process held violate of the Federal Constitution by *Furman* v. *Georgia.*

FOURTH ASSIGNMENT OF ERROR

The death penalty imposed by Section 2929.04, Revised Code, constitutes cruel and unusual punishment prohibited by the Eeighth Amendment and Article I, Section 9 of the Ohio Constitution.

We stated in *Reaves,* supra, that:

> "We find nothing upon the face of Revised Code Sections 2903.01, 2929.02, 2929.03 and 2929.04 to render those enactments unconstitutional; nor does either logic or experience require us to conclude that those sections have been or will be unconstitutionally applied. They appear to us to be appropriate legislative responses to the stimulus of *Furman,* supra, in that juries and judges are now provided with narrow definitions of crimes for which the death penalty is to be imposed and are given standards to follow in determining the sentence in capital cases."

In *Reaves,* supra, we disposed of an assertion that the death penalty imposed by Section 2929.04, O.R.C., constitutes cruel and unusual punishment prohibited by the Eighth Amendment of the Federal Constitution and Article I, Section 9 of the Ohio Constitution, by extracting from the opinion of the Chief Justice in *Furman,* supra, at p. 2799, this language:

> "In the 181 years since the enactment of the Eighth Amendment, not a single decision of this Court has cast the slightest shadow of a doubt on the constitutionality of capital punishment. In rejecting Eighth Amendment attacks on particular modes of execution, the Court has more than once implicitly denied that capital punishment is impermissibly 'cruel' in the constitutional sense."

Hence, we find the third and fourth assignments of error to be not well taken on the authority of *Reaves,* supra.

The judgment of the Court of Common Pleas of Hamilton County is affirmed.

PALMER and KEEFE, J. J., CONCUR.

PLEASE NOTE:

The Court has placed of record its own entry in this case on the date of the release of this Opinion.

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

NO. C-75022

STATE OF OHIO,

Plaintiff-Appellee,

vs.

ROLAND REAVES,

Defendant-Appellant.

OPINION

(Filed January 26, 1976)

Appeal From The Court of Common Pleas
Hamilton County, Ohio

Messrs. Simon L. Leis, Jr., Fred J. Cartolano and Robert R. Hastings, Jr., 420 Hamilton County Court House, Court and Main Streets, Cincinnati, Ohio 45202, for Plaintiff-Appellee,

Messrs. Bernard J. Gilday and D. Shannon Smith, 1500 American Building, Cincinnati, Ohio 45202, for Defendant-Appellant.

SHANNON, P. J.

This cause came on to be heard upon the appeal, the transcript of the docket and journal entries, the original papers and pleadings from the Court of Common Pleas of Hamilton County, the transcript of the proceedings, the assignments of error, the briefs of the parties and amicus curiae and arguments of counsel.

During the very early hours of the morning of July 17, 1974, a Cincinnati police officer, while in uniform and in performance of his duties, was shot to death. The following day, the appellant was arrested and subsequently indicted with one Ricardo Woods for the crime of aggravated murder.

Appellant's trial to a jury commenced October 15, 1974, and over objection by the defense the court permitted examination of prospective jurors upon voir dire concerning their attitudes toward capital punishment. Three challenges for cause by the prosecution based upon opposition to capital punishment expressed during such questioning were sustained.

Ultimately, the jury returned a verdict of guilty as charged in the second count of the indictment and a verdict determining appellant's guilt of the necessary specification set forth in the indictment pertaining to the second count.

The court then proceeded according to law and on January 13, 1975, after a finding of the absence of any of the mitigating factors under Section 2929.04 (B) O.R.C., the appellant was sentenced to death.

This timely appeal was taken from the judgment of guilt and the sentence of death.

I.

The first assignment of error is:

> "The Trial Court substantially erred to the prejudice of Appellant in denying Appellant's Motion to Dismiss for the reason that the provisions of Sections 2903.01, 2929.02, 2929.03 and 2929.04 of the Ohio Re-

vised Code unconstitutionally permit arbitrary imposition of the death penalty in violation of the Eighth and Fourteenth Amendments to the Federal Constitution."

Furman v. *Georgia*, 92 S. Ct. 2726 (1972), 408 U.S. 238 (1972), is the predicate for appellant's contention that the Ohio statutes fail to satisfy the "constitutional requirements laid down" by the United States Supreme Court and accordingly constitute a statutory scheme which permits arbitrary, rare and discriminatory use of the death penalty.

Directly, *Furman* struck down the Georgia death penalty statute. One of the effects of the decision was to demand a measure of change from legislative bodies throughout the Union in the manner in which the penalty is to be imposed.

We think it would serve no useful purpose to iterate the rationale in the respective opinions in *Furman*. But, as a beginning to our disposition of the vexing questions posed by the initial assignment of error, we must refer to some salients in the melange which makes up the body of that case.

Only two members of the Court, Justices Brennan and Marshall, concluded that the Eight Amendment prohibits capital punishment for all crimes and under all circumstances. We take it as given, then, that "the constitutional prohibition against 'cruel and unusual punishments' cannot be construed to bar the punishment of death." See, opinion, Mr. Chief Justice Burger, *Furman* v. *Georgia*, 92 S. Ct. 2726 (1972) at pp. 2796-97. Since capital punishment is not per se violative of the Eighth Amendment, the inquiry turns to the question what statutory schemes will pass constitutional muster if a state wishes to maintain the availability of capital punishment.

The opinions of Justices Stewart and White, essential to support the plurality judgment setting aside the sentences considered by the Court, turned on the assumption that the punishment of death was being meted out randomly. They concluded that the sentences had to be set aside, not because the death penalty was impermissibly cruel, but because juries and judges had failed to exercise their sentencing discretion in acceptable fashion. Mr. Justice Stewart stated that the penalty was being "wantonly" and "freakishly" imposed while Mr. Justice White stressed the "infrequency" of its imposition.

Responding to what appears to be the mandate in *Furman* and to the suggestion of the Chief Justice that state legislatures could enact statutes meeting constitutional requirements by providing judges and juries with definite standards for the imposition of the penalty or by defining in narrower and more specific terms those crimes warranting capital punishment, the Ohio Legislature enacted Sections 2903.01, 2929.03 and 2929.04, Ohio Revised Code.

We have examined these laws and conclude that there is nothing there which would permit us to find them facially unconstitutional, i.e., the Ohio statutory scheme would appear to exclude the elements of wanton, freakish, or arbitrary application of the penalty which proved fatal to the Georgia statute.

To the best of our knowledge but one court of review in Ohio had addressed itself to the issue before us here. In *State* v. *Bayless*, Ninth District Court of Appeals of Ohio, case number 74-3-244, decided February 5, 1975, (unreported), we find:

> ".. . the statutes of Ohio permitting the impositions of the death penalty do not permit an arbitrary imposition of the death penalty and are not constitutionally impermissible under the Constitution of the

United States or the Constitution of the State of Ohio."

The Chief Justice stated in his opinion in *Furman,* supra, that:

"There are no obvious indications that capital punishment offends the conscience of society to such a degree that our traditional deference to the legislative judgment must be abandoned.

In context, he observed,

". . . reported results [of public opinion polls] have shown nothing approximating the universal condemnation of capital punishment that might lead us to suspect that the legislatures in general have lost touch with current social values." See, *Furman* v. *Georgia,* 92 S. Ct. 2726 (1972), pp. 2801-02, Part III, Opinion of the Chief Justice.

In *Furman,* the petitioners argued that the general revulsion toward the death penalty which they submitted would lead to its repeal if it was commonly and widely enforced is demonstrated by the disparity of the number of cases in which capital punishment had been imposed and the number of cases in which it had been available.

Apparently, it was the body of empirical evidence presented by petitioners in support of such argument that persuaded Justices Stewart and White to conclude that infliction of a sentence of death offends the Eighth and Fourteenth Amendment.

However, we have had no similar data spread before us. It cannot be argued persuasively that judges and juries have randomly, capriciously or arbitrarily imposed the death penalty under the new code because there is almost no table of experience in its use.

Simply put, it has not been demonstrated (we think the paucity of examples of use of the penalty under the new code makes it impossible of demonstration) that judges and juries have abused the severely reduced and restricted discretion afforded them currently.

To sum up, we find nothing upon the face of Revised Code Section 2903.01, 2929.02, 2929.03 and 2929.04 to render those enactments unconstitutional; nor does either logic or experience require us to conclude that those sections have been or will be unconstitutionally applied. They appear to us to be appropriate legislative responses to the stimulus in *Furman,* supra, in that juries and judges are now provided with narrower definitions of crimes for which the death penalty is to be imposed and are given standards to follow in determining the sentence in capital cases. Thus, we find ourselves in accord with *Bayless,* supra. The first assignment of error accordingly is not well taken.

II.

The second assignment of error is:

"The Trial Court substantially erred to the prejudice of Appellant in denying Appellant's Motion to Dismiss for the reason that the death penalty imposed by Section 2929.04 of the Ohio Revised Code constitutes cruel and unusual punishment prohibited by the Eighth Amendment of the Federal Constitution and Article I, Section 9 of the Ohio Constitution."

This assignment is subsumed actually in the first assignment of error. Therefore, we have little to add to what has already been stated.

However, in *Furman,* supra, the Chief Justice flatly declared:

"In the 181 years since the enactment of the Eighth

> Amendment, not a single decision of this Court has cast the slightest shadow of a doubt on the constitutionality of capital punishment. In rejecting Eighth Amendment attacks on particular modes of execution, the Court has more than once implicitly denied that capital punishment is impermissibly 'cruel' in the constitutional sense." See *Furman* v. *Georgia*, 92 S. Ct. 2726 (1972), Opinion of the Chief Justice, p. 2799.

As we have stated, the effect of *Furman* was to hand back the problem of infliction of capital punishment to the appropriate legislative bodies and to demand of them an unspecified measure of change in its administration.

In commenting upon that remand, the Chief Justice said in Part VI of his opinion from which we have quoted earlier:

> "The legislatures are free to eliminate capital punishment for specific crimes or to carve out limited exceptions to general abolition of the penalty, *without adherence to the conceptual strictures of the Eighth Amendment.*" (emphasis ours).

Because of the force of that directive and essentially for the reasons set forth in our disposition of the initial assignment of error, the second assignment is not well taken.

III.

The third assignment of error is:

> "The Court substantially erred to the prejudice of Appellant in permitting the prosecution, during voir dire examination, to question prospective jurors concerning their feelings and opinions on Capital Punishment, and when it sustained the prosecution's challenges for cause of prospective jurors based on their answers to such inquiries."

Appellant urges that Crim. R. 24(B) has superseded Section 2945.25, O.R.C., and the rule read in conjunction with the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Ohio Constitution, precludes any inquiry of a prospective juror touching upon his opinions which might preclude him from finding an accused guilty of an offense punishable by death.

We cannot agree that Section 2945.25, O.R.C., has been superseded or negated by the criminal rule. Indeed, we are convinced that Section 2945.25 is a substantive statutory provision and accordingly any rule of procedure in conflict therewith would be invalid. See, *State* v. *Hughes* (1975), 41 Ohio St. 2d 208, *State* v. *Waller*, Court of Appeals for Hamilton County, number C-74666, decided November 24, 1975 (unreported), and *State* v. *Leary*, Court of Appeals for Hancock County, number 5-75-19, decided November 12, 1975 (unreported).

Section 2945.25 provides, in pertinent part:

> "A person called as a juror on an indictment may be challenged for the following causes:
>
> • • •
>
> (c) In the trial of a capital offense, that his opinions preclude him from finding the accused guilty of an offense punishable with death;"

Therefore, the court below did not err in permitting the prosecution to examine prospective jurors upon voir dire concerning their attitudes toward capital punishment because a juror maintaining an opinion precluding him from finding an accused guilty of an offense punishable by death, as was the defendant-appellant here, may be challenged for cause by law.

The third assignment of error, then, is not well taken.

The judgment of the Court of Common Pleas of Hamilton County, Ohio, is affirmed.

PALMER and KEEFE, J. J., CONCUR.

PLEASE NOTE:

The Court has placed of record its own entry in this case on the date of the release of this Opinion.

APPENDIX E

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

No. B742064

THE STATE OF OHIO

vs.

ROLAND A. REAVES

JURY VERDICT
(Entered October 24, 1974)

We, the Jury, in the issue joined, find the defendant, ROLAND A. REAVES guilty of AGGRAVATED MURDER, after attempting to commit AGGRAVATED ROBBERY, sec. 2903.01 R.C. as charged in the SECOND COUNT of the Indictment.

[Signed by all twelve (12) jurors]

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

No. B742064

THE STATE OF OHIO

vs.

ROLAND A. REAVES

JURY VERDICT

(Entered October 24, 1974)

We, the Jury, in the issue joined, find the defendant, ROLAND A. REAVES guilty of AGGRAVATED MURDER, sec. 2903.01 R.C. IN SPECIFICATION TO THE SECOND COUNT, of the Indictment.

[Signed by all twelve (12) jurors]

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO
CRIMINAL DIVISION

NO. B-742064

STATE OF OHIO,

Plaintiff,

v.

ROLAND REAVES,

Defendant.

ENTRY FINDING AN ABSENCE OF MITIGATING CIRCUMSTANCES PURSUANT TO A HEARING UNDER SECTION 2929.03 AND 2929.04 OF THE OHIO REVISED CODE

(Entered January 15, 1975)

This matter came before the Court on January 13, 1975, for a hearing on mitigating circumstances prior to sentencing for a capital offense, pursuant to Sections 2929.03 and 2929.04 of the Ohio Revised Code. The Court at that time was in possession of reports of a pre-sentence investigation and psychiatric examinations, as required by Section 2929.03 of the Revised Code. At the said hearing, the defendant, Roland Reaves, was given the opportunity to present testimony or to make a statement and, through his attorneys, to argue the question of mitigating circumstances, all of which the defendant declined to do.

The Court, therefore, finds that none of the mitigating

circumstances set forth in Section 2929.04 of the Revised Code, to-wit:

1) that the victim of the offense induced or facilitated it;

2) that it is unlikely that the offense would have been committed but for the fact that the offender was under duress, coercion, or strong provocation; or

3) that the offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity;

has been shown to exist by a preponderance of the evidence as required by law, and that the Court, therefore, is required by law under Section 2929.03 (E) to sentence the defendant, Roland Reaves, to death in the electric chair.

THE STATE OF OHIO, HAMILTON COUNTY
COURT OF COMMON PLEAS
CRIMINAL DIVISION

NO. B742064

THE STATE OF OHIO

vs.

ROLAND A. REAVES

INDICTMENT FOR: AGGRAVATED MURDER
2903.01 R.C.

(Entered January 13, 1975)

The Defendant was present in open Court with his Counsel, Bernard J. Gilday, Jr., and Thomas Stueve, on the 13th. day of January, 1975.

The Court informed the Defendant that as he well knew, after trial by a Jury the Defendant had been found Guilty, of the offense of Aggravated Murder, 2903.01 R.C. in specification to the 2nd count of the Indictment.

The Court afforded Defendant's Counsel an opportunity to speak on behalf of the Defendant. The Court addressed the Defendant, Roland A. Reaves, personally and asked him if he wished to make a statement in his own behalf or present any information in mitigation of punishment.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by this Court, that the Defendant, Roland A. Reaves, on the charge of Aggravated Murder, 2903.01 R.C.

in specification to the 2nd. Count of the Indictment, be taken to the Jail of Hamilton County, at Cincinnati, Ohio, and within the next Thirty (30) Days, be delivered by the Sheriff of Hamilton County, Ohio, to the Warden of the Ohio State Penitentiary, and that on the 15th. day of May, 1975, the said Warden shall cause a current of electricity of sufficient intensity to cause Death, to pass through the Body of Roland A. Reaves, the application of such current to be continued until the said Roland A. Reaves is DEAD.

The Defendant was notified of his right to appeal as required by Crim. R. 32 (A) (2).

/s/ FRANK M. GUSWEILER
Judge

THE STATE OF OHIO, HAMILTON COUNTY
COURT OF COMMON PLEAS
CRIMINAL DIVISION

NO. B-742064

THE STATE OF OHIO

vs.

RICARDO L. WOODS

INDICTMENT FOR: AGGRAVATED MURDER
SEC. 2903.01 R.C.

(Entered October 23, 1974)

COURT FINDING

This cause came on this day to be heard, the Defendant Ricardo L. Woods, having Waived a Trial by Jury, in writing and was submitted to the panel of Three (3) judges.

And, the Court, having heard the evidence and the arguments of counsel, unanimously find that the Defendant, Ricardo L. Woods, is guilty of Aggravated Murder as he stands charged in the Second Count of the indictment and guilty of the specification to the second count of the indictment.

/s/ WILLIAM R. MATTHEWS
Judge

/s/ WILLIAM S. MATHEWS
Judge

/s/ ROBERT L. BLACK, JR.
Judge

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO
CRIMINAL DIVISION

NO. B-742064

STATE OF OHIO

Plaintiff

v.

RICARDO L. WOODS

Defendant

INDICTMENT FOR: AGGRAVATED MURDER 2903.01 R. C.

(Entered January 16, 1975)

The defendant, Ricardo L. Woods, was present in open court with his counsel, Jack Rubenstein and Harry H. McIlwain, on the sixteenth day of January, 1975, having been previously found guilty of the offense of Aggravated Murder, 2903.01 R. C., and the specifications to the second count of the indictment.

Pursuant to Sections 2929.03 and 2929.04 of the Ohio Revised Code, a hearing on mitigating circumstances prior to sentencing for a capital offense was held.

The Court afforded defendant's counsel an opportunity to speak on behalf of the defendant, and to present any testimony and other evidence relevant to the penalty which should be imposed.

Upon consideration of the reports, testimony, other evi-

dence, statement of the offender, and arguments of counsel submitted to the Court, pursuant to division (D) of Section 2929.03 of the Ohio Revised Code, this panel of three Judges unanimously find that none of the mitigating circumstances listed in division (B) of Section 2929.04 have been established by a preponderance of the evidence.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by this Court that the defendant, Ricardo L. Woods, on the charge of Aggravated Murder, 2903.01 R. C. in specification to the second count of the Indictment, be taken to the Jail of Hamilton County, at Cincinnati, Ohio, and within the next thirty (30) days be delivered by the Sheriff of Hamilton County, Ohio, to the Warden of the Ohio State Penitentiary, and that on the nineteenth day of May, 1975, the said Warden shall cause a current of electricity of sufficient intensity to cause death, to pass through the body of Ricardo L. Woods, the application of such current to be continued until the said Ricardo L. Woods is DEAD.

The defendant was notified of his right to appeal as required by Crim. R. 32 (A) (2).

/s/ WILLIAM R. MATTHEWS
Judge

/s/ WILLIAM S. MATHEWS
Judge

/s/ ROBERT L. BLACK, JR.
Judge

APPENDIX F

THE STATE OF OHIO, HAMILTON COUNTY

The Court of Common Pleas of Hamilton County:
Term of July in the year nineteen hundred and seventy-four

HAMILTON COUNTY, ss.

• • •

SECOND COUNT

AND THE GRAND JURORS AFORESAID UPON THEIR OATHS AFORESAID DO FURTHER PRESENT THAT ROLAND A. REAVES AND RICARDO A. WOODS ON OR ABOUT THE SEVENTEENTH DAY OF JULY IN THE YEAR NINETEEN HUNDRED AND SEVENTY FOUR AT THE COUNTY OF HAMILTON AND STATE OF OHIO, AFORESAID, PURPOSELY CAUSED THE DEATH OF DAVID L. COLE WHILE THE SAID ROLAND A. REAVES AND RICARDO A. WOODS WERE FLEEING IMMEDIATELY AFTER ATTEMPTING TO COMMIT AGGRAVATED ROBBERY, IN VIOLATION OF SECTION 2903.01 REVISED CODE OF OHIO.

• • •

SPECIFICATION TO THE SECOND COUNT

THE GRAND JURORS FURTHER FIND AND SPECIFY THAT AT THE TIME OF THE OFFENSE PRESENTED ABOVE, THE VICTIM, THE SAID DAVID L. COLE, WAS A LAW ENFORCEMENT OFFICER WHOM THE SAID ROLAND A. REAVES AND RI-

CARDO A. WOODS KNEW TO BE SUCH, AND WHO AT THE TIME WAS ENGAGED IN HIS DUTIES.

• • •

/s/ SIMON L. LEIS, JR.
Prosecuting Attorney
Hamilton County, Ohio

/s/ FRED J. CARTOLANO
Assistant Prosecuting Attorney

APPENDIX G

OHIO REVISED CODE

2929.03 Imposing sentence for a capital offense

(A) If the indictment or count in the indictment charging aggravated murder contains no specification of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge, the trial court shall impose sentence of life imprisonment on the offender.

(B) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, the verdict shall separately state whether the accused is found guilty or not guilty of the principal charge and if guilty of the principal charge, whether the offender is guilty or not guilty of each specification. The jury shall be instructed on its duties in this regard, which shall include an instruction that a specification must be proved beyond a reasonable doubt in order to support a guilty verdict on such specification, but such instruction shall not mention the penalty which may be the consequence of a guilty or not guilty verdict on any charge or specification.

(C) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge but not guilty of each of the specifications, the trial court shall impose sentence of life imprisonment on the offender. If the indictment contains one or more specifications listed in division (A) of such

section, then, following a verdict of guilty of both the charge and one or more of the specifications, the penalty to be imposed on the offender shall be determined:

(1) By the panel of three judges which tried the offender upon his waiver of the right to trial by jury;

(2) By the trial judge, if the offender was tried by jury.

(D) When death may be imposed as a penalty for aggravated murder, the court shall require a pre-sentence investigation and a psychiatric examination to be made, and reports submitted to the court, pursuant to section 2947.06 of the Revised Code. Copies of the reports shall be furnished to the prosecutor and to the offender or his counsel. The court shall hear testimony and other evidence, the statement, if any, of the offender, and the arguments, if any, of counsel for the defense and prosecution, relevant to the penalty which should be imposed on the offender. If the offender chooses to make a statement, he is subject to cross-examination only if he consents to make such statement under oath or affirmation.

(E) Upon consideration of the reports, testimony, other evidence, statement of the offender, and arguments of counsel submitted to the court pursuant to division (D) of this section, if the court finds, or if the panel of three judges unanimously finds that none of the mitigating circumstances listed in division (B) of section 2929.04 of the Revised Code is established by a preponderance of the evidence, it shall impose sentence of death on the offender. Otherwise, it shall impose sentence of life imprisonment on the offender.

• • •

2929.04 Criteria for imposing death or imprisonment for a capital offense

(A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code, and is proved beyond a reasonable doubt:

(1) The offense was the assassination of the president of the United States or person in line of succession to the presidency, or of the governor or lieutenant governor of this state, or of the president-elect or vice president-elect of the United States, or of the governor-elect or lieutenant governor-elect of this state, or of a candidate for any of the foregoing offices. For purposes of this division, a person is a candidate if he has been nominated for election according to law, or if he has filed a petition or petitions according to law to have his name placed on the ballot in a primary or general election.

(2) The offense was committed for hire.

(3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender.

(4) The offense was committed while the offender was a prisoner in a detention facility as defined in section 2921.-01 of the Revised Code.

(5) The offender has previously been convicted of an offense of which the gist was the purposeful killing of or attempt to kill another, committed prior to the offense at bar, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.

(6) The victim of the offense was a law enforcement officer whom the offender knew to be such, and either the victim was engaged in his duties at the time of the offense, or it was the offender's specific purpose to kill a law enforcement officer.

(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated robbery, or aggravated burglary.

(B) Regardless of whether one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment and proved beyond a reasonable doubt, the death penalty for aggravated murder is precluded when, considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of the following is established by a preponderance of the evidence:

(1) The victim of the offense induced or facilitated it.

(2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.

(3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.

• • •

CONSTITUTION OF THE UNITED STATES

AMENDMENT VIII – EXCESSIVE BAIL, FINES, PUNISHMENTS

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Supreme Court, U. S.
FILED
APR 14 1977
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1976

No. 76-1308

RICARDO WOODS

and

ROLAND REAVES,

Petitioners,

vs.

STATE OF OHIO,

Respondent.

REPLY BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SIMON L. LEIS, JR.
Prosecuting Attorney

FRED J. CARTOLANO
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IN THE

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RICARDO WOODS

and

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Respondent.

REPLY BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent respectfully submits that it is opposed to the issuance of a writ of certiorari in the within cause for the reason that the Ohio Supreme Court has decided the federal question at issue in accord with the applicable decisions of this court concerning the imposition of the death penalty.

OPINIONS BELOW

The Petition of the petitioners correctly cites the opinions below.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

The decisions, briefs and memorandum filed in the courts in Petitioners cases as they progressed from the Court of Common Pleas to the Supreme Court of Ohio reflect that Petitioners did raise the question as to the constitutionality of Sections 2929.03 and 2929.04 of the Ohio Revised Code. It is to be noted, however, the question concerning the constitionality of the trial judge or three-judge panel as the sentencing authority and the question challenging the sufficiency of appellate review afforded a defendant facing a death sentence were not raised below.

I. Whether Sections 2929.03 and 2929.04 of the Ohio Revised Code, which provide for the imposition of the death penalty under certain circumstances, are violative of the Eighth Amendment of the United States Constitution.

II. Whether Section 2929.04 (B) of the Ohio Revised Code, which sets forth the mitigating circumstances in a death penalty case, is overbroad or vague so as to be subject to constitutional attack.

III. Whether requiring the sentencing authority, either the trial judge or a three-judge panel, to sentence a defendant to death, where the evidence presented during the mitigation hearing does not establish by a preponderance one of the enumerated mitigating circumstances in Section 2929.04 (B) of the Ohio Revised Code, is violative of due process.

IV. Whether Ohio's system of appellate review, which guarantees a right of direct appeal in all death penalty cases, is violative of the Eighth Amendment of the United States Constitution.

V. Whether this Court should decide federal questions raised here for the first time on review of state court decisions where Petitioners failed to raise or preserve such questions in the state courts.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Eighth Amendment of the United States Constitution and Sections 2903.01, 2929.02, 2929.03, and 2929.04 of the Ohio Revised Code, are set forth in Appendix A herein.

STATEMENT OF THE CASE

Petitioner Woods and Petitioner Reaves were jointly indicted by the grand jury of Hamilton County, Ohio, on July 19, 1974, for three counts of aggravated murder with specifications of aggravation involving the homicide of David Cole, an on-duty Cincinnati Police Officer.

Each petitioner filed a motion to dismiss the charges for the reason that Ohio's statutory scheme providing for the death penalty was unconstitutional. Both motions were subsequently overruled by the respective trial courts that conducted petitioners' trials.

Petitioner Woods elected to be tried by a three-judge panel while Petitioner Reaves elected to be tried by a jury. Petitioner Woods was found guilty as charged in the second count and specification of the indictment on October 23, 1974. Petitioner Reaves was found guilty as

charged in the second count and specification of the indictment on October 24, 1974. Pre-sentence examinations and psychiatric examinations were ordered with regard to both petitioners by their respective courts.

Following a finding that no mitigating circumstances had been established by a preponderance of the evidence the trial court sentenced Petitioner Reaves to death on January 13, 1975. Following a finding that no mitigating circumstances had been established by a preponderance of the evidence the three-judge panel sentenced Petitioner Woods to death on January 16, 1975.

Petitioners sentences and judgments were affirmed by the Court of Appeals for the First Appellate District of Ohio, Hamilton County on January 26, 1976 (Appendix B).

The Supreme Court of Ohio affirmed the convictions and sentences of Petitioners on December 1, 1976 (Appendix B). An application for rehearing was denied by the Supreme Court of Ohio on December 22, 1976.

ARGUMENT

I.

Whether Sections 2929.03 and 2929.04 of the Ohio Revised Code, which provide for the imposition of the death penalty under certain circumstances, are violative of the Eighth Amendment of the United States Constitution.

The primary issue presented by petitioners is whether Ohio's statutory scheme which imposes the death penalty passes constitutional muster in light of this Court's most recent pronouncements on capital punishment as it relates to the Eighth Amendment. Respondent submits that the Ohio laws conform with constitutional standards as defined by this court and as applied by the Supreme Court of Ohio.

Following the decision in *Furman* v. *Georgia*, 408 U.S. 238 (1972), the Ohio legislature enacted Section 2929.02, Ohio Revised Code (Appendix A), which prescribes the death penalty or life imprisonment for the crime of aggravated murder. Sections 2929.03 and 2929.04, Ohio Revised Code, (Appendix A) set forth the procedure for determining whether the death sentence is to be imposed. Aggravated murder is limited to purposeful killing as defined by Section 2903.01, Ohio Revised Code (Appendix A).

Those statutes permit the death penalty only where one or more aggravating circumstances is specified in the indictment and proved beyond a reasonable doubt. The aggravating factors include: assassination of the President, Vice-President, Governor, Lieutenant Governor, or a person who has been elected to or is a candidate for any such office; murder for hire; murder to escape accountability for

another crime; murder by a prisoner; repeat murder or mass murder; killing a law enforcement officer; and murder in the course of certain felonies.

Under the Ohio statutory scheme the trier of fact may be either a jury of, if waived, a three-judge panel. First the trier of fact is to consider whether the defendant is guilty of the charge, and if found guilty, whether he is also guilty of one or more of the specifications in the indictment.

If the defendant is found guilty of the charge and innocent of the specification, a sentence of life imprisonment is imposed. If the defendant is found guilty of the charge and guilty of one or more of the specifications, a separate hearing is held before the trial judge or three-judge panel to determine whether mitigating circumstances exist which preclude imposition of the death penalty.

A pre-sentence investigation and a psychiatric examination of the defendant are required to be made before the hearing. Copies of these reports are furnished to the prosecutor and to the defendant or his counsel. Other evidence and testimony may be submitted at the mitigation hearing, including any statement, sworn or unsworn by the defendant. The death penalty is to be imposed if the trial judge or the three-judge panel unanimously finds that none of the three mitigating factors have been established to exist by a preponderance of the evidence.

In considering whether one of the mitigating circumstances has been established by a preponderance of the evidence the sentencing authority is to consider the nature and circumstances of the offense and the history, character, and condition of the defendant.

Thus, Ohio's statutes provide for a bifurcated trial, in which the issues of guilt, as to the charge and of certain statutorily defined aggravating circumstances, are determined by the jury or, if waived, by a three-judge panel, and the issues of mitigation and sentence are determined by the trial judge or by the three-judge panel.

The defendant has a direct right of appeal of his conviction and sentence pursuant to Rule 4 (B), Ohio Rules of Appellate Procedure (Appendix C). Appeals by leave are governed by Rule 5, Ohio Rules of Appellate Procedure (Appendix C). In accordance with Rule 12 (A), Ohio Rules of Appellate Procedure (Appendix C), the Court of Appeals shall rule on all assignments of error briefed by the Appellant. If the sentence of death is affirmed by a Court of Appeals, a further appeal as a matter of right may be taken to the Supreme Court of Ohio, as provided by Section 2 (B) (2) (a) (ii), Article IV of the Ohio Constitution (Appendix C).

Ohio's statutory scheme differs somewhat from any of these considered by this Court in its July 2, 1976, decisions, but it is basically similar to the Georgia, Florida, and Texas statutes which this Court found to be constitutional. The Ohio statutory scheme insures that the sentencing authority is apprised of information relevant to the imposition of the death sentence and provided with standards to guide its use of the information. Guided by this information and applicable standards the sentencing authority is directed to give attention to the nature or circumstances of the crime committed and to the character or record of the defendant. Thus, Ohio's statutory scheme provides a framework in which the sentencing authority can not wantonly or freakishly impose the death sentence.

II.

Whether Section 2929.04(B) of the Ohio Revised Code, which sets forth the mitigating circumstances in a death penalty case, is overbroad or vague so as to be subject to constitutional attack.

It is submitted that the mitigating circumstances enumerated in Section 2929.04 (B), Ohio Revised Code pass constitutional muster. These standards, although limited to three, echo the language found in the Model Penal Code, (Section 210.6 (4) (c) (f) (g)), and Florida Statutes (Section 921.141 (6) (b) (c) (e) (f)). "While these questions and decisions may be hard, they require no more line-drawing than is commonly required of a fact finder in a lawsuit", *Proffitt* v. *Florida*, — U.S. —, 96 S. Ct. 2960, 2969 (1976). As the Court pointed out the requirements of *Furman* are satisfied, "when the sentencing authority's discretion is guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty", — U.S. —, 96 S. Ct. at 2969. Clearly, Ohio's statutory scheme satisfies this requirement.

The mitigating circumstances must also be considered as they have been construed by the Supreme Court of Ohio. The Supreme Court of Ohio has repeatedly held that the mitigating circumstances are not to be construed narrowly and that relevant factors, such as prior criminal record and the age of the defendant, are to be considered by the sentencing authority, *State* v. *Bell*, 48 Ohio St. 2d 270, 280-283 (1976); *State* v. *Black*, 48 Ohio St. 2d 262, 267-268 (1976); *State* v. *Woods*, 48 Ohio St. 2d 127, 133-138 (1976); and *State* v. *Osborne*, 49 Ohio St. 2d 135, 145-147 (1976). Through the state appellate procedure each

of the mitigating circumstances in Section 2929.04 (B) has undergone close judicial scrutiny.

Petitioner Reaves initially indicated his desire to waive a mitigation determination (R 952)*. The trial court, however, rejected the attempted waiver and had the pre-sentence examinations conducted. The record further reflects that Petitioner Reaves and his counsel had copies of the probation report and the psychiatric evaluation at the mitigation hearing held on January 13, 1976 (R 955). Thereupon, at Petitioner Reaves request, the matter of mitigation was submitted to the trial judge based upon the reports filed in the case (R 956). A review of the record in *State* v. *Reaves* reveals that a copy of the pre-sentence investigation is contained within that record.

Petitioner Woods' mitigation hearing was conducted on January 16, 1976. The pre-sentence report was admitted into evidence on the motion of Petitioner Woods trial counsel (R 284)**. Petitioner Woods, his mother, his father, and one of the psychiatrists who examined Petitioner Woods then testified (R 284-298, 298-305, 305-313, 313-322). Although the pre-sentence investigation was not before the Supreme Court of Ohio in Petitioner Woods case, the Court did consider the evidence presented at the mitigation hearing. That evidence substantially encompasses the relevant data as it applies to Petitioner Woods. The sentencing authority knew how old the defendant was, what the defendant's criminal record was, what the defendant's background was, what the defendant's involvement in the crime was, and what the psychiaric

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* "R" is a reference to the Transcript of Proceedings in the case of *State of Ohio* v. *Roland A. Reaves*.

** "R" is a reference to the Transcript of Proceedings in the case of *State of Ohio* v. *Ricardo Woods*.

evaluation was. All these factors were spread upon the record for the purposes of appellate review.

The mitigating circumstances in Section 2929.04 (B) channel and guide the discretion of the sentencing authority so as to avoid the arbitrary and capricious imposition of the death penalty.

III.

Whether requiring the sentencing authority, either the trial judge or a three-judge panel, to sentence a defendant to death, where the evidence presented during the mitigation hearing does not establish by a preponderance one of the enumerated mitigating circumstances in Section 2929.04 (B) of the Ohio Revised Code, is violative of due process.

Although this Court has pointed out that the jury sentencing in a capital case can perform an important societal function, *Witherspoon* v. *Illinois*, 391 U.S. 510, 519 n. 15 (1968), it has never suggested that jury sentencing is constitutionally required, *Proffitt* v. *Florida*, —— U.S. ——, 96 S. Ct. 2960, 2966 (1976).

Pursuant to the Ohio statutory scheme the trial judge or three-judge panel is the sentencing authority depending on whether or not the defendant waives a trial by jury. It is submitted that this system of judicial sentencing enhances the constitutionality of the Ohio statutory scheme in so far as it should lead to even greater consistency in the imposition of capital punishment due to the experience a trial judge has in sentencing procedures.

At the time the mitigation hearing is conducted a defendant stands convicted of aggravated murder and at least

one of the aggravating circumstances which was specified in the indictment. The introduction of mitigating circumstances has traditionally been a defense function. The mitigating circumstances listed in Section 2929.04 (B) are far broader than affirmative defenses which the defense must bear the burden of going forward with evidence upon in order to excuse or otherwise justify the commission of an offense.

Once the defendant stands convicted of the charge and specification, it should rightfully be his burden to present evidence as to why the punishment should be lessened. To require the defendant to do so does not infringe upon any due process rights, *State* v. *Lockett*, 49 Ohio St. 2d 48, 65-66 (1976).

Placing the burden of proof on the defendant at mitigation is clearly distinguishable from placing a burden of proof on the defendant to prove his innocence. For that reason it is submitted that the Ohio statutory procedure does not run afoul of the Due Process Clause as this Court has interpreted that clause in the cases of *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975) and *In re Winship*, 397 U.S. 358 (1970). In both those cases the Court stated it was the government's burden to prove *guilt* beyond a reasonable doubt. Ohio statutory scheme does not deviate from that command and is consistent with the Court's ruling in *Leland* v. *Oregon*, 343 U.S. 790 (1952).

Petitioners have raised this issue for the first time in their petition. It was neither argued or briefed in the Court of Appeals or the Supreme Court of Ohio. Neither of those courts or the trial court had an opportunity to rule upon the merits of the issue. Respondent prays that this Court not be the one to first issue an opinion on this question that was not raised by the Petitioner in the State courts.

IV.

Whether Ohio's system of appellate review, which guarantees a right of direct appeal in all death penalty cases, is violative of the Eighth Amendment of the United States Constitution.

It is submitted that defendants facing the death penalty in Ohio have adequate appellate review so as to insure that the penalty is not arbitrarily or capriciously imposed. Defendants have a direct right of appeal to the Court of Appeals and a direct right of appeal to the Supreme Court of Ohio where the lower court of review affirms their death sentence, Rule 4 (B), Ohio Rules of Appellate Procedure, Section 2 (B) (2) (a) (ii), Article IV of the Ohio Constitution. Thus, the Supreme Court of Ohio, a court with statewide jurisdiction, affords a defendant sentenced to death a full judicial review so as to promote the even-handed, rational and consistent imposition of the death sentences under law, *Jurek* v. *Texas*, — U.S. —, 96 S. Ct. 2950, 2958 (1976); *State* v. *Miller*, 49 Ohio St. 2d 198, 204 (1977).

This Court has never mandated a particular form of appellate review in death penalty cases. In *State* v. *Bayless*, 48 Ohio St. 2d 73, 86 (1976), the Supreme Court of Ohio stated that in all capital cases the aggravating and mitigating circumstances would be independently reviewed in each case to insure that capital sentences are fairly imposed by Ohio's trial judges. As the Supreme Court of Ohio observed in *State* v. *Osborne*, 49 Ohio St. 2d 135, 146 (1976), "The Ohio statutes require the death sentence to be imposed upon all defendants convicted of aggravated murder coupled with at least one of seven aggravating circumstances, provided that none of the three mitigating

factors exists." Accordingly, all similarly situated defendants are sentenced alike and have their sentences reviewed by a court of statewide jurisdiction.

Like the previous question this question was never briefed by the Petitioners in the state courts. For the reason that the issue is raised in this Court for the first time Respondent asks this Court not rule on this question.

V.

Whether this Court should decide federal questions raised here for the first time on review of state court decisions where Petitioners failed to raise or preserve such questions in the state courts.

As noted above petitioners did not raise or preserve the questions raised in the third and fourth questions in the state courts.

In *Cardinale* v. *Louisiana*, 394 U.S. 437 (1969) the Court stated, "It was very early established that the Court will not decide federal constitutional questions raised here for the first time on review of state court decisions," 394 U.S. at 438. This position has been reaffirmed numerous times by simply stating as the Court did in *Tacon* v. *Arizona*, 410 U.S. 351, 352 (1973), "We cannot decide issues raised for the first time here."

Respondent brings this issue to the Court's attention for the reason that it feels granting review based on the questions presented in the third and fourth questions would only result in this Court dismissing the case for granting certiorari improvidently once a review of the record was made. Attached hereto as Appendix D is a complete list

of the assignments of error and propositions of law raised by the Petitioners in the state courts.

The issues raised here by Petitioners in the third and fourth questions, although not raised or preserved by Petitioners below, have been ruled upon by the Supreme Court of Ohio in the cases of *State* v. *Lockett*, 49 Ohio St. 2d 48, 65-66 (1976), *State* v. *Osborne*, 49 Ohio St. 2d 135, 147 (1976), and *State* v. *Miller*, 49 Ohio St. 2d 198, 204 (1977).

Where federal questions are raised before this Court for the first time on review of state decisions, it is submitted that this Court should not decide those issues.

CONCLUSION

In summary, it is respectfully submitted that the Court should deny a writ of certiorari in this case for two reasons. First, the Supreme Court of Ohio correctly decided the issues with respect to the constitutionality of Ohio's statutory scheme which allows for the imposition of the death penalty. This Court's decisions of July 2, 1976, concerning the death penalty were considered and correctly applied by the Supreme Court of Ohio. Secondly, Petitioners have failed to raise or preserve questions involving federal questions in the state courts. Accordingly, Respondent respectfully asks this Court to deny the writ of certiorari in this case.

Respectfully submitted,

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APPENDIX A

STATUTES AND CONSTITUTIONAL PROVISIONS

OHIO REVISED CODE

§ 2903.01 Aggravated murder

(A) No person shall purposely, and with prior calculation and design, cause the death of another.

(B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.

(C) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the Revised Code.

§ 2929.02 Penalties for murder

(A) Whoever is convicted of aggravated murder in violation of section 2903.01 of the Revised Code shall suffer death or be imprisoned for life, as determined pursuant to sections 2929.03 and 2929.04 of the Revised Code. In addition, the offender may be fined an amount fixed by the court, but not more than twenty-five thousand dollars.

(B) Whoever is convicted of or pleads guilty to murder in violation of section 2903.02 of the Revised Code shall be imprisoned for an indefinite term of fifteen years to life. In addition, the offender may be fined an amount fixed by the court, but not more than fifteen thousand dollars.

(C) The court shall not impose a fine in addition to imprisonment or death for aggravated murder, or in addition to imprisonment for murder, unless the offense was committed with purpose to establish, maintain, or facilitate an activity of, a criminal syndicate as defined in section 2923.04 of the Revised Code, or was committed for hire or for purpose of gain.

(D) The court shall not impose a fine or fines for aggravated murder or murder which, in the aggregate and to the extent not suspended by the court, exceeds the amount which the offender is or will be able to pay by the method and within the time allowed without undue hardship to himself or his dependents, or will prevent him from making reparation for the victim's wrongful death.

§ 2929.03 Imposing sentence for a capital offense

(A) If the indictment or count in the indictment charging aggravated murder contains no specification of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge, the trial court shall impose sentence of life imprisonment on the offender.

(B) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, the verdict shall separately state whether the accused is found guilty or not guilty of the principal charge and, if guilty of the principal charge, whether the offender is guilty or not guilty of each specification. The jury shall be instructed on its duties in this regard, which shall include an instruction that a

specification must be proved beyond a reasonable doubt in order to support a guilty verdict on such specification, but such instruction shall not mention the penalty which may be the consequence of a guilty or not guilty verdict on any charge or specification.

(C) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge but not guilty of each of the specifications, the trial court shall impose sentence of life imprisonment on the offender. If the indictment contains one or more specifications listed in division (A) of such section, then, following a verdict of guilty of both the charge and one or more of the specifications, the penalty to be imposed on the offender shall be determined:

(1) By the panel of three judges which tried the offender upon his waiver of the right to trial by jury;

(2) By the trial judge, if the offender was tried by jury.

(D) When death may be imposed as a penalty for aggravated murder, the court shall require a pre-sentence investigation and a psychiatric examination to be made, and reports submitted to the court, pursuant to section 2947.06 of the Revised Code. Copies of the reports shall be furnished to the prosecutor and to the offender or his counsel. The court shall hear testimony and other evidence, the statement, if any, of the offender, and the arguments, if any, of counsel for the defense and prosecution, relevant to the penalty which should be imposed on the offender. If the offender chooses to make a statement, he is subject to cross-examination only if he consents to make such statement under oath or affirmation.

(E) Upon consideration of the reports, testimony, other evidence, statement of the offender, and arguments of counsel submitted to the court pursuant to division (D) of this section, if the court finds, or if the panel of three judges unanimously finds that none of the mitigating circumstances listed in division (B) of section 2929.04 of the Revised Code is established by a preponderance of the evidence, it shall impose sentence of death on the offender. Otherwise, it shall impose sentence of life imprisonment on the offender.

§ 2929.04 Criteria for imposing death or imprisonment for a capital offense

(A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code, and is proved beyond a reasonable doubt:

(1) The offense was the assassination of the president of the United States or person in line of succession to the presidency, or of the governor or lieutenant governor of this state, or of the president-elect or vice president-elect of the United States, or of the governor-elect or lieutenant governor-elect of this state, or of a candidate for any of the foregoing offices. For purposes of this division, a person is a candidate if he has been nominated for election according to law, or if he has filed a petition or petitions according to law to have his name placed on the ballot in a primary or general election, or if he campaigns as a write-in candidate in a primary or general election.

(2) The offense was committed for hire.

(3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender.

(4) The offense was committed while the offender was a prisoner in a detention facility as defined in section 2921.01 of the Revised Code.

(5) The offender has previously been convicted of an offense of which the gist was the purposeful killing of or attempt to kill another, committed prior to the offense at bar, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.

(6) The victim of the offense was a law enforcement officer whom the offender knew to be such, and either the victim was engaged in his duties at the time of the offense, or it was the offender's specific purpose to kill a law enforcement officer.

(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary.

(B) Regardless of whether one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment and proved beyond a reasonable doubt, the death penalty for aggravated murder is precluded when, considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of the following is established by a preponderance of the evidence:

(1) The victim of the offense induced or facilitated it.

(2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.

(3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.

CONSTITUTION OF THE UNITED STATES

AMENDMENT VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

APPENDIX B

OPINIONS BELOW

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

NO. C-75047

STATE OF OHIO,
Plaintiff-Appellee,

vs.

RICARDO WOODS,
Defendant-Appellant.

OPINION

(Filed January 26, 1976)

Appeal From The Court of Common Pleas
Hamilton County, Ohio

Messrs. Simon L. Leis, Jr., Robert R. Hastings, Jr., and Merlyn Shiverdecker, 420 Hamilton County Court House, Court and Main Streets, Cincinnati, Ohio 45202, for Plaintiff-Appellee,

Messrs. Jack C. Rubenstein, 609 Atlas Bank Building, Cincinnati, Ohio 45202, and Harry H. McIllwain, 805 Atlas Bank Building, Cincinnati, Ohio 45202, for Defendant-Appellant.

SHANNON, P. J.

This cause came on to be heard upon the appeal, the

transcript of the docket and journal entries and original papers from the Court of Common Pleas of Hamilton County, the transcript of the proceedings, the assignments of error, the briefs of counsel and amicus curiae and the arguments of counsel.

The defendant-appellant, Ricardo Woods, was convicted of the crime of aggravated murder and an appropriate specification set forth in the indictment by a three judge panel established after he had waived trial by jury. The same panel on a later date found that the defendant-appellant had failed to demonstrate any of the mitigating circumstances prescribed by Section 2929.04 (B), O.R.C. and accordingly sentenced him to death. One Roland Reaves was indicted jointly with the defendant-appellant, but was tried separately to a jury which found him to be guilty of aggravated murder and the pertinent specification. Subsequently, it was determined that Reaves had failed to establish mitigating circumstances and he, too, was sentenced to death.

This is an appeal timely taken from the judgment and sentences imposed upon the defendant-appellant, Ricardo Woods.

Conviction of the defendant-appellant was had on the second count of the indictment which alleged, inter alia:

> ". . . that Roland A. Reaves and Ricardo A. Woods on or about the seventeenth day of July in the year nineteen hundred and seventy four at the County of Hamilton and State of Ohio . . . purposely caused the death of David L. Cole while the said Roland A. Reaves and Ricardo A. Woods were fleeing immediately after attempting to commit Aggravated Robbery, in violation of Section 2903.01 Revised Code of Ohio."

Shortly after midnight on July 17, 1974, the Cincinnati Police received a telephone call from a citizen advising that

a man was on the roof of the United Dairy Farmers store at 2373 Florence Avenue, Cincinnati, Hamilton County, Ohio. The police then broadcast that information and officers responded. One of the officers, Patrolman Kramer, observed two men walking on Florence Avenue in the vicinity of the store looking over their shoulders, and he used his police radio to convey that information to fellow officers. Another officer, Patrolman David Cole, was also responding to the scene and approaching it on Florence Avenue.

Just after he made his broadcast, Officer Kramer heard a series of gunshots. Other police enroute to the store also heard the burst of gunfire and one of them, Patrolman Sizemore, saw Patrolman Cole's police car stopped near the curbing of the street. Sizemore stopped his vehicle, ran to Cole's aid and found Cole's body prone at the rear of the cruiser. Cole had been shot and Sizemore was unable to obtain any response to his efforts to get Cole to talk. Cole was transported to a hospital where he was pronounced dead on arrival. Ultimately, the cause of death was determined to have been internal hemorrage resulting from multiple gunshot wounds to Cole's head, chest and body.

Ronald Reaves was arrested on July 18, 1974, in Cincinnati and subsequently made a statement to investigating police which implicated Ricardo Woods. Woods was arrested on July 19, 1974, in West Virginia at the home of his mother.

After his arrest, Woods told police that he had been living with a sister of Roland Reaves for some time prior to the time of the homicide, and that Reaves had been staying with them for about two weeks. Woods stated that on July 16, 1974, he and Reaves agreed that they needed money and, using funds obtained by cashing a check for

unemployment compensation belonging to Woods, they bought a gun which Reaves told the seller he planned to use to rob a loan company. Just before midnight the same evening Woods stated that he and Reaves parked Reaves' car close to the United Dairy Farmers store and began to "case" it; that they could see the store manager, who was adding up the day's receipts preparatory to making up a bank deposit, inside; that he (Woods) was armed with a .22 caliber pistol while Reaves had the .38 caliber handgun purchased earlier; that they planned to wait until the manager came out to take the money; and that he was watching the store from a bus stop across the street while Reaves was on the roof of the building.

Reaves came down from the roof and joined Woods, who said "things looked funny." Just at that moment, the fire department was making a run apparently nearby and sounding sirens. Woods and Reaves were walking away from the store and had reached a point about 800 feet distant when Patrolman Cole stopped his car. Woods stated that he leaned in the front window of the police cruiser to talk to Cole just as the officer was getting out on the opposite side of the car; that when Cole got to the rear of the cruiser Reaves began to fire at him, the first bullet striking Cole in the chest; that Reaves fired three or four times; that he (Woods) then shot at Cole who at that time was prone on the street, bleeding, and that as he and Reaves fled the scene, Cole fired three times at them. The post mortem examination of Cole's body disclosed that he had been struck by bullets from both guns.

In his statement, Woods detailed the path taken in their flight and described the clothing into which they changed. He told police that he left Cincinnati for West Virginia before noon on July 17, 1974, but that Reaves had decided to remain in the city.

Four errors have been assigned by appellant, two of which relate to the state of the evidence, while the remainder address themselves to constitutional issues. The first assignment of error, as phrased by appellant, is:

> "A defendant may not be convicted of aggravated murder when the state fails to prove that the homicide occurred during the commission of an attempted aggravated robbery. Where the evidence is insufficient to prove an attempted aggravated robbery the charge must be reduced to murder."

These contentions were among those advanced by appellant in a motion for acquittal made below after the prosecution had rested its case in chief. That motion was partially successful in that the court granted it as it pertained to the first and third counts of the indictment. The court overruled the motion as it was addressed to the second count and second specification and it is to such rejection that the assignment refers in substance, though not in form.

Here, in presenting his argument supportive of the assignment, the appellant concedes that he and Reaves intended to commit a robbery at the United Dairy Farmers store, but asserts that the evidence adduced by the prosecution fails to establish any "overt act" committeed by either of them "directed toward the consummation of their criminal designs." Appellant submits that his viewing of the store premises from his vantage point across the street and Reaves' activities on the roof were "equivocal" acts "performed in the preparation of the crime" and therefore did not suffice as proof of an attempt to commit armed robbery.

Appellant makes no effort to temper the proof by the prosecution that David L. Cole was killed purposely, relying instead upon the contention that the homicide was

not committed while the murderers were in flight from an attempted armed robbery.

In enacting chapter 2911, O.R.C., (effective January 1, 1974), the Ohio legislature expanded the concept and coverage of antecedent robbery statutes. Consequently, section 2911.01, O.R.C., which defines aggravated robbery, provides in material part that:

> "(A) No person, in attempting or committing a theft offense as defined in section 2913.01 of the Revised Code, *or in fleeing immediately after such attempt* or offense, shall . . .
>
> (1) Have a deadly weapon . . . as defined in section 2923.11 of the Revised Code on or about his person or under his control;" (Emphasis ours).

Section 2913.01 (K) (1), O.R.C., declares aggravated robbery to be a theft offense, and both the .38 and the .22 caliber pistols carried by Reaves and Woods were deadly weapons by statutory definition, projectiles from which took the life of Officer Cole.

The sole question, then, is whether at the time of the homicide this appellant and his companion were fleeing from an attempted aggravated robbery.

As to the sufficiency of evidence with respect to the element of "fleeing," see our comments *infra* under the second assignment of error; as to whether the foregoing facts were sufficient to constitute an "atempted aggravated robbery," we note Section 2923.02 (A), O.R.C., which provides that:

> "No person, purposely or knowingly, . . . shall engage in conduct which, if successful, would . . . result in the offense."

After considering this statute in light of the totality of the evidence, we are convinced that the activities of the

appellant and his companion constituted an attempt to commit aggravated robbery.

Admittedly, Woods and Reaves planned to commit a robbery and bought a weapon specifically for use in such a crime. Together, they went to the United Dairy Farmers store and engaged in reconnaissance of the surrounding area. Each took a position which would enable him to carry out his plan to rob the manager as he left the store. They were armed and ready in all respects to complete their scheme. The final step, save for the intervening events, would have been for them to have shoved their guns into the belly of the manager in an effort to take from him the money they knew he would be carrying.

Must that final step have been taken before it could be said that Woods and Reaves were guilty of attempting to commit an aggravated robbery? We think not.

In reaching the conclusion that the prosecution had adduced evidence sufficient to establish an attempt to commit aggravated robbery, we are aided by the opinion in *State* v. *Farmer* (1951), 156 Ohio St. 214. There, Justice Taft restated an observation made in *Fox* v. *State* (1878), 34 Ohio St. 377, at page 379:

> "It is quite clear that in an 'attempt' to commit an offense an 'intent' to cimmit it must be present; and it is equally clear that the presence of intent alone is not sufficient. There must be some concomitant act or movement toward the execution of the purpose."

In adopting that pronouncement from *Fox*, supra, Justice Taft added at page 216 of his opinion in *Farmer*, supra, that:

> ". . . the act necessary in an attempt to commit a felony need not be the last proximate act prior to the consummation of the felony intended to be perpetrated."

Consequently, we hold that the evidence considered in its totality satisfies the test prescribed by Section 2923.02 (A), O.R.C., as well as the antecedent tests established by case law. Woods and Reaves clearly had engaged in a series of acts or movements toward the execution of their plan to rob and, as we comprehend the law to be, the prosecution was not required to prove the last proximate act prior to the commission of the robbery, i.e., that a gun had been shoved in the belly of the manager and a demand made for his money.

There being sufficient proof of an attempted aggravated robbery, the panel was not constrained to reduce the charge, but was entitled to and did consider properly the charge of aggravated murder.

The first assignment of error is not well taken.

The second assignment of error is, like the first, stated as a proposition of law. It is given to us that:

> "Where a defendant proves by clear and convincing evidence that he abandoned his effort to commit an offense under circumstances manifesting a complete and voluntary renunciation of his criminal purpose, the defendant may not be tried for aggravated murder for a homicide committed thereafter."

In support of this assignment which, essentially, echoes the first, appellant argues that it is clear from the evidence that he and Reaves had voluntarily abandoned their criminal intent to commit aggravated robbery prior to the killing of David L. Cole and accordingly that he was entitled to have the charge against him reduced to murder on the ground that at the time of the homicide he was not in flight from an attempted aggravated robbery.

Section 2923.02 (D), O.R.C., provides that:

> "It is an affirmative defense to a charge under [Section 2923.02, O.R.C.] that the actor abandoned his effort to commit the offense or otherwise prevented its commission, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose."

Again we must disagree with appellant in his assessment of the weight of the evidence in this case. We do not believe that the panel erred in finding, as it obviously did, that appellant had failed to establish the affirmative defense afforded him by the statute.

We have recounted above the salient evidence which in our opinion established that Woods and Reaves were attempting to commit the aggravated robbery which had been planned and prepared for. To that litany, we add now the fact that the conspirators left the scene on foot without making an effort to return to Reaves' car parked next to the store. That automobile was retrieved sometime during the afternoon of July 17, 1974, by the man who had sold the .38 caliber pistol to Reaves, and then was returned to Reaves.

The statute requires expressly that the renunciation of the criminal purpose be voluntary. After review of all the evidence, we can not say that the finding by the triers of the facts, that the appellant had failed to establish that the abandonment of his criminal purpose and plan was voluntary, was contrary to the manifest weight of the evidence. We reiterate that we are convinced that the robbery was frustrated by a turn of events — that the conspirators did not abandon their criminal scheme because of remorse, a change of heart, repentence or otherwise voluntarily, but fled the scene because of alarm and fright. The attempt failed to ripen into an accom-

plishment only because of the intervening circumstances and the plan was not aborted by a decision reached independently of those factors. That being so, it follows that the rejection of the defense proffered was not contrary to law.

The second assignment of error is not well taken for the reasons set forth immediately above coupled with those given in our resolution of the first assignment of error.

The third and fourth assignments of error raise constitutional questions which we have considered and ruled upon in *State* v. *Reaves*, Hamilton County, Number C-75022 (1st Dist. Ct. of App., January 26, 1976), unreported.

These assignments of error are:

THIRD ASSIGNMENT OF ERROR

The provisions of Sections 2903.01, 2929.03 and 2929.04, unconstitutionally permit arbitrary imposition of the death penalty in violation of the Eighth and Fourteenth Amendments to the Federal Constitution. Where an aggravated murder defendant is sentenced to death under Section 2903.03 (B) after a finding of guilt on the specification in Section 2929.04 (A) (7), that defendant has been convicted and sentenced under arbitrary and vague provisions of the new criminal code which do not differ in any constitutionally significant respect from the arbitrary selection process held violate of the Federal Constitution by *Furman* v. *Georgia*.

FOURTH ASSIGNMENT OF ERROR

The death penalty imposed by Section 2929.04, Revised Code, constitutes cruel and unusual punishment prohibited by the Eeighth Amendment and Article I, Section 9 of the Ohio Constitution.

We stated in *Reaves*, supra, that:

> "We find nothing upon the face of Revised Code Sections 2903.01, 2929.02, 2929.03 and 2929.04 to render those enactments unconstitutional; nor does either logic or experience require us to conclude that those sections have been or will be unconstitutionally applied. They appear to us to be appropriate legislative responses to the stimulus of *Furman*, supra, in that juries and judges are now provided with narrow definitions of crimes for which the death penalty is to be imposed and are given standards to follow in determining the sentence in capital cases."

In *Reaves*, supra, we disposed of an assertion that the death penalty imposed by Section 2929.04, O.R.C., constitutes cruel and unusual punishment prohibited by the Eighth Amendment of the Federal Constitution and Article I, Section 9 of the Ohio Constitution, by extracting from the opinion of the Chief Justice in *Furman*, supra, at p. 2799, this language:

> "In the 181 years since the enactment of the Eighth Amendment, not a single decision of this Court has cast the slightest shadow of a doubt on the constitutionality of capital punishment. In rejecting Eighth Amendment attacks on particular modes of execution, the Court has more than once implicitly denied that capital punishment is impermissibly 'cruel' in the constitutional sense."

Hence, we find the third and fourth assignments of error to be not well taken on the authority of *Reaves*, supra.

The judgment of the Court of Common Pleas of Hamilton County is affirmed.

PALMER and KEEFE, J. J., CONCUR.

PLEASE NOTE:

The Court has placed of record its own entry in this case on the date of the release of this Opinion.

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

NO. C-75022

STATE OF OHIO,
Plaintiff-Appellee,

vs.

ROLAND REAVES,
Defendant-Appellant.

OPINION

(Filed January 26, 1976)

Appeal From The Court of Common Pleas
Hamilton County, Ohio

Messrs. Simon L. Leis, Jr., Fred J. Cartolano and Robert R. Hastings, Jr., 420 Hamilton County Court House, Court and Main Streets, Cincinnati, Ohio 45202, for Plaintiff-Appellee,

Messrs. Bernard J. Gilday and D. Shannon Smith, 1500 American Building, Cincinnati, Ohio 45202, for Defendant-Appellant.

SHANNON, P. J.

This cause came on to be heard upon the appeal, the transcript of the docket and journal entries, the original papers and pleadings from the Court of Common Pleas of Hamilton County, the transcript of the proceedings, the as-

signments of error, the briefs of the parties and amicus curiae and arguments of counsel.

During the very early hours of the morning of July 17, 1974, a Cincinnati police officer, while in uniform and in performance of his duties, was shot to death. The following day, the appellant was arrested and subsequently indicted with one Ricardo Woods for the crime of aggravated murder.

Appellant's trial to a jury commenced October 15, 1974, and over objection by the defense the court permitted examination of prospective jurors upon voir dire concerning their attitudes toward capital punishment. Three challenges for cause by the prosecution based upon opposition to capital punishment expressed during such questioning were sustained.

Ultimately, the jury returned a verdict of guilty as charged in the second count of the indictment and a verdict determining appellant's guilt of the necessary specification set forth in the indictment pertaining to the second count.

The court then proceeded according to law and on January 13, 1975, after a finding of the absence of any of the mitigating factors under Section 2929.04 (B) O.R.C., the appellant was sentenced to death.

This timely appeal was taken from the judgment of guilt and the sentence of death.

I.

The first assignment of error is:

> "The Trial Court substantially erred to the prejudice of Appellant in denying Appellant's Motion to Dismiss for the reason that the provisions of Sections 2903.01, 2929.02, 2929.03 and 2929.04 of the Ohio Re-

> vised Code unconstitutionally permit arbitrary imposition of the death penalty in violation of the Eighth and Fourteenth Amendments to the Federal Constitution."

Furman v. *Georgia*, 92 S. Ct. 2726 (1972), 408 U.S. 238 (1972), is the predicate for appellant's contention that the Ohio statutes fail to satisfy the "constitutional requirements laid down" by the United States Supreme Court and accordingly constitute a statutory scheme which permits arbitrary, rare and discriminatory use of the death penalty.

Directly, *Furman* struck down the Georgia death penalty statute. One of the effects of the decision was to demand a measure of change from legislative bodies throughout the Union in the manner in which the penalty is to be imposed.

We think it would serve no useful purpose to iterate the rationale in the respective opinions in *Furman*. But, as a beginning to our disposition of the vexing questions posed by the initial assignment of error, we must refer to some salients in the melange which makes up the body of that case.

Only two members of the Court, Justices Brennan and Marshall, concluded that the Eight Amendment prohibits capital punishment for all crimes and under all circumstances. We take it as given, then, that "the constitutional prohibition against 'cruel and unusual punishments' cannot be construed to bar the punishment of death." See, opinion, Mr. Chief Justice Burger, *Furman* v. *Georgia*, 92 S. Ct. 2726 (1972) at pp. 2796-97. Since capital punishment is not per se violative of the Eighth Amendment, the inquiry turns to the question what statutory schemes will pass constitutional muster if a state wishes to maintain the availability of capital punishment.

The opinions of Justices Stewart and White, essential to support the plurality judgment setting aside the sentences considered by the Court, turned on the assumption that the punishment of death was being meted out randomly. They concluded that the sentences had to be set aside, not because the death penalty was impermissibly cruel, but because juries and judges had failed to exercise their sentencing discretion in acceptable fashion. Mr. Justice Stewart stated that the penalty was being "wantonly" and "freakishly" imposed while Mr. Justice White stressed the "infrequency" of its imposition.

Responding to what appears to be the mandate in *Furman* and to the suggestion of the Chief Justice that state legislatures could enact statutes meeting constitutional requirements by providing judges and juries with definite standards for the imposition of the penalty or by defining in narrower and more specific terms those crimes warranting capital punishment, the Ohio Legislature enacted Sections 2903.01, 2929.03 and 2929.04, Ohio Revised Code.

We have examined these laws and conclude that there is nothing there which would permit us to find them facially unconstitutional, i.e., the Ohio statutory scheme would appear to exclude the elements of wanton, freakish, or arbitrary application of the penalty which proved fatal to the Georgia statute.

To the best of our knowledge but one court of review in Ohio had addressed itself to the issue before us here. In *State* v. *Bayless*, Ninth District Court of Appeals of Ohio, case number 74-3-244, decided February 5, 1975, (unreported), we find:

> ".. . the statutes of Ohio permitting the impositions of the death penalty do not permit an arbitrary imposition of the death penalty and are not constitutionally impermissible under the Constitution of the

United States or the Constitution of the State of Ohio."

The Chief Justice stated in his opinion in *Furman,* supra, that:

"There are no obvious indications that capital punishment offends the conscience of society to such a degree that our traditional deference to the legislative judgment must be abandoned.

In context, he observed,

". . . reported results [of public opinion polls] have shown nothing approximating the universal condemnation of capital punishment that might lead us to suspect that the legislatures in general have lost touch with current social values." See, *Furman* v. *Georgia,* 92 S. Ct. 2726 (1972), pp. 2801-02, Part III, Opinion of the Chief Justice.

In *Furman,* the petitioners argued that the general revulsion toward the death penalty which they submitted would lead to its repeal if it was commonly and widely enforced is demonstrated by the disparity of the number of cases in which capital punishment had been imposed and the number of cases in which it had been available.

Apparently, it was the body of empirical evidence presented by petitioners in support of such argument that persuaded Justices Stewart and White to conclude that infliction of a sentence of death offends the Eighth and Fourteenth Amendment.

However, we have had no similar data spread before us. It cannot be argued persuasively that judges and juries have randomly, capriciously or arbitrarily imposed the death penalty under the new code because there is almost no table of experience in its use.

Simply put, it has not been demonstrated (we think the paucity of examples of use of the penalty under the new code makes it impossible of demonstration) that judges and juries have abused the severely reduced and restricted discretion afforded them currently.

To sum up, we find nothing upon the face of Revised Code Section 2903.01, 2929.02, 2929.03 and 2929.04 to render those enactments unconstitutional; nor does either logic or experience require us to conclude that those sections have been or will be unconstitutionally applied. They appear to us to be appropriate legislative responses to the stimulus in *Furman,* supra, in that juries and judges are now provided with narrower definitions of crimes for which the death penalty is to be imposed and are given standards to follow in determining the sentence in capital cases. Thus, we find ourselves in accord with *Bayless,* supra. The first assignment of error accordingly is not well taken.

II.

The second assignment of error is:

"The Trial Court substantially erred to the prejudice of Appellant in denying Appellant's Motion to Dismiss for the reason that the death penalty imposed by Section 2929.04 of the Ohio Revised Code constitutes cruel and unusual punishment prohibited by the Eighth Amendment of the Federal Constitution and Article I, Section 9 of the Ohio Constitution."

This assignment is subsumed actually in the first assignment of error. Therefore, we have little to add to what has already been stated.

However, in *Furman,* supra, the Chief Justice flatly declared:

"In the 181 years since the enactment of the Eighth

> Amendment, not a single decision of this Court has cast the slightest shadow of a doubt on the constitutionality of capital punishment. In rejecting Eighth Amendment attacks on particular modes of execution, the Court has more than once implicitly denied that capital punishment is impermissibly 'cruel' in the constitutional sense." See *Furman* v. *Georgia*, 92 S. Ct. 2726 (1972), Opinion of the Chief Justice, p. 2799.

As we have stated, the effect of *Furman* was to hand back the problem of infliction of capital punishment to the appropriate legislative bodies and to demand of them an unspecified measure of change in its administration.

In commenting upon that remand, the Chief Justice said in Part VI of his opinion from which we have quoted earlier:

> "The legislatures are free to eliminate capital punishment for specific crimes or to carve out limited exceptions to general abolition of the penalty, *without adherence to the conceptual strictures of the Eighth Amendment.*" (emphasis ours).

Because of the force of that directive and essentially for the reasons set forth in our disposition of the initial assignment of error, the second assignment is not well taken.

III.

The third assignment of error is:

> "The Court substantially erred to the prejudice of Appellant in permitting the prosecution, during voir dire examination, to question prospective jurors concerning their feelings and opinions on Capital Punishment, and when it sustained the prosecution's challenges for cause of prospective jurors based on their answers to such inquiries."

Appellant urges that Crim. R. 24(B) has superseded Section 2945.25, O.R.C., and the rule read in conjunction with the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Ohio Constitution, precludes any inquiry of a prospective juror touching upon his opinions which might preclude him from finding an accused guilty of an offense punishable by death.

We cannot agree that Section 2945.25, O.R.C., has been superseded or negated by the criminal rule. Indeed, we are convinced that Section 2945.25 is a substantive statutory provision and accordingly any rule of procedure in conflict therewith would be invalid. See, *State* v. *Hughes* (1975), 41 Ohio St. 2d 208, *State* v. *Waller*, Court of Appeals for Hamilton County, number C-74666, decided November 24, 1975 (unreported), and *State* v. *Leary*, Court of Appeals for Hancock County, number 5-75-19, decided November 12, 1975 (unreported).

Section 2945.25 provides, in pertinent part:

> "A person called as a juror on an indictment may be challenged for the following causes:
>
> • • •
>
> (c) In the trial of a capital offense, that his opinions preclude him from finding the accused guilty of an offense punishable with death;"

Therefore, the court below did not err in permitting the prosecution to examine prospective jurors upon voir dire concerning their attitudes toward capital punishment because a juror maintaining an opinion precluding him from finding an accused guilty of an offense punishable by death, as was the defendant-appellant here, may be challenged for cause by law.

The third assignment of error, then, is not well taken.

The judgment of the Court of Common Pleas of Hamilton County, Ohio, is affirmed.

PALMER and KEEFE, J. J., CONCUR.

PLEASE NOTE:

The Court has placed of record its own entry in this case on the date of the release of this Opinion.

SUPREME COURT OF OHIO

THE STATE OF OHIO,

Appellee,

v.

WOODS,

Appellant.

THE STATE OF OHIO,

Appellee,

v.

REAVES,

Appellant.

[Cite as State v. Woods (1976), 48 Ohio St 2d 127.]

Criminal law — Aggravated murder — Imposition of death penalty — Constitutionality — Specifications — R.C. 2923.02 (A) — "Criminal attempt" proved, when — Mitigation of death sentence — R.C. 2929.04 (B), construed — Duress or coercion established, how.

1. A "criminal attempt" is when one purposely does or omits to do anything which is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime. To constitute a substantial step, the conduct must be strongly corroborative of the actor's criminal purpose. (R. C. 2923.02[A] construed.)

2. Within the meaning of the standard for mitigation of the death sentence for aggravated murder in R. C. 2929.04 (B), duress or coercion may be established by proof that force, threat of force, strong persuasion or domination by another, necessitous circumstances, or some combination of these, has overcome the mind or volition of the defendant so that he acted other than he ordinarily would have acted in the absence of those influences.

(Nos. 76-137 and 76-155—Decided December 1, 1976.)

APPEALS from the Court of Appeals for Hamilton County.

Shortly after midnight on July 17, 1974, the Cincinnati police received a telephone call from a woman who said that she had seen a man of the roof of the United Dairy Farmers store at 2373 Florence Avenue in Cincinnati. That information was broadcast to patrol cars in the area and several officers responded. One of the officers, Patrolman Terry Kramer, observed two men looking over their shoulders while walking on Florence Avenue in the vicinity of the store, and he reported that information over the police radio. Another officer, Patrolman David Cole, also responded to the broadcast and was approaching the scene along Florence Avenue.

Just after he made his broadcast, Patrolman Kramer heard a series of gunshots. Other officers also heard the shots and came to the scene. Patrolman Cole was lying in the street at the rear of his cruiser, dying from multiple gunshot wounds. Cole was pronounced dead on arrival at the hospital, and the subsequent autopsy and ballistics examination disclosed that he had been shot by both a .22 and a .38 caliber weapon.

Ronald Reaves, the defendant in case No. 76-155, was arrested on July 18, 1974, in Cincinnati and subsequently made statements to investigating officers which implicated Ricardo Woods, the defendant in case No. 76-137. Woods was arrested on July 19, 1974, in West Virginia at the home of his mother. After the arrival of Cincinnati police, Woods made a complete statement as to his part in the events leading up to and following the homicide.

Both defendants were charged with multiple counts of aggravated murder with specifications. Reaves was tried before a jury, and Woods before a three-judge panel. The evidence presented at the two trials was virtually identical. It established that Woods had been living with Reaves' sister for some time and had recently been laid off from his construction job. Woods and Reaves met for the first time, about two weeks before the killing, when Reaves came to Cincinnati from Chicago. Woods state that on July 16, he and Reaves agreed that they needed money, and, using Woods' unemployment check as funds, Reaves negotiated the purchase of a .38 caliber revolver, which Reaves told the seller he planned to use to rob a loan company. Later, around midnight, Reaves, accompanied by Woods, parked his car close to the United Dairy Farmers store, and both men began to "case" the store. According to Woods' statement, they could see the store manager inside. The plan was to wait until the manager came out and to "hold him up and take the money." Reaves had the .38 caliber revolver and Woods had a .22 caliber pistol which Reaves had brought from Chicago. Reaves then left Woods as a lookout across the street, and climbed onto the roof of the store.

Reaves descended from the roof and joined Woods who said that "things looked funny." Apparently, they had heard the sirens of a fire department unit making a run

nearby. Woods and Reaves were walking away from the store and down Florence Avenue when Patrolman Cole skidded to a stop near the curb. Woods stated that he leaned in the front passenger window of the police cruiser to talk to Cole just as the officer was getting out on the opposite side of the car, and that when Cole got to the rear of the cruiser, Reaves began to fire at him, the first bullet striking Cole in the chest. Reaves fired three or four times, and Woods also shot at Cole, who at that time was lying on the street, as he and Reaves fleld the scene. Cole fired four shots without hitting the fleeing men.

The pair ran to the house of a friend nearby, changed clothes, and drove away in the friend's car. Woods left the next morning for his mother's home in West Virginia.

At their separate trials, Reaves and Woods were each found guilty of aggravated murder, under a count in the indictment charging that they had purposely caused the death of Patrolman Cole while fleeing immediately after attempting to commit aggravated robbery, and guilty of the second specification, that at the time of the offense the victim was a law-enforcement officer whom they knew to be such, and who at the time was engaged in his duties. Following mitigation hearings, both defendants were sentenced to death. The Court of Appeals affirmed both judgments in separate opinions, and the causes are now before this court as a matter of right.

Mr. Simon L. Leis, Jr., prosecuting attorney, *Mr. Fred J. Cartolano, Mr. Robert R. Hastings, Jr.*, and *Mr. Merlyn Shiverdecker*, for appellee.

Mr. Jack C. Rubenstein and *Mr. Harry H. McIllwain*, for appellant Woods.

Messrs. Gilday, Jung & Gilday, Mr. Bernard J. Gilday, Jr., and Mr. D. Shannon Smith, for appellant Reaves.

I

STERN, J. In case No. 76-155, appellant Reaves raises three propositions of law. Two of these assert that Ohio's constitutional scheme for imposition of the death penalty is unconstitutional. That issue was decided by this court in *State* v. *Bayless* (1976), 48 Ohio St. 2d 73, and need not be reconsidered here. Those propositions of law are overruled.

Appellant also claims error in the prosecution's inquiry upon *voir dire* into veniremen's opposition to capital punishment. Three prospective jurors were excused because of their opinions on capital punishment, and the record shows that each answered definitely that he could not join in a guilty verdict if the result was that the defendant might be sentenced to death. This court finds that no error was committed in excusing them as persons "otherwise unsuitable for any other cause to serve as a juror." Crim. R. 24 (B) (14); *State* v. *Bayless, supra.*

II

In case No. 76-137, appellant Woods raises similar claims relating to the constitutionality of Ohio's death penalty statutes and also contends that the evidence was insufficient to prove an attempted robbery, or, in the alternative, that the defense had proved an abandonment of the offense, and that the charge of aggravated murder against Woods should accordingly have been reduced to murder.

There is no serious dispute concerning the facts of this case. Defendants Reaves and Woods decided to rob the manager of the United Dairy Farmers store by accosting him as he came out with the day's receipts; they "cased" the premises; Reaves climbed onto the roof, while Woods

stayed behind as a lookout; Reaves then climbed back down, apparently having heard the nearby fire engine siren; and Reaves and Woods then walked away, leaving Reaves' car behind.

R.C. 2923.02 (A) provides that: "No person, purposely or knowingly, and when purpose or knowledge is sufficient culpability for the commission of an offense, shall engage in conduct which, if successful, would constitute or result in the offense."

The committee comment for this section states, in part, that: "In order to prove an attempt to commit an offense, it must be shown that particular conduct directed toward commission of the offense took place and that such conduct, if successful, would constitute or result in the offense. • • •" This language establishes that the essential elements of a criminal attempt are the *mens rea* of purpose or knowledge, and conduct directed toward the commission of an offense. The statute does not, however, indicate how far this conduct must proceed toward the actual consummation of the crime in order to be considered an attempt to commit that crime. There is also little case law in Ohio on this question, although this court has held that the conduct necessary for a criminal attempt "need not be the last proximate act prior to the consummation of the felony." *State* v. *Farmer* (1951), 156 Ohio St. 214, 216, 102 N. E. 2d 11; *Fox* v. *State* (1878), 34 Ohio St. 377. In *Farmer*, an assault with intent to rob was held, at page 217, "sufficient to justify the triers of the facts in determining beyond a reasonable doubt that the action of the defendant at the time of • • • [an] altercation was action taken to carry out that intent and therefore amounted to an attempt to perpetrate robbery." In this case, Reaves committed no assault, and the question arises as to whether his acts nevertheless amounted to an attempt to rob.

American courts have generally agreed that intent to commit a crime does not of itself constitute an attempt, nor does mere preparation. The difficulty is to formulate a standard that excludes preparations prior to an actual attempt to commit a crime, while including, as punishable, those acts which are so dangerously close to resulting in a crime that intervention and arrest by the police are justified, even before the "last proximate act." Various tests have been suggested and followed in other jurisdictions. There is a good discussion of this problem and the various approaches in Wechsler, Jones and Korn, The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy. 61 Columbia L. Rev. 571, 573-621. It is not necessary to consider each of the alternative approaches here. Ohio's statutory definitions of criminal offenses is the Revised Code are based largely upon the American Law Institute's Model Penal Code, and the standard adopted in the latter Code appears to us workable, reasonable, and consistent with the language of R.C. 2923.02 (A). Under Section 5.01 of the Model Penal Code, an attempt is when one "purposely does or omits to do anything which is • • • an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime." To constitute a "substantial step," the conduct must be "strongly corroborative of the actor's criminal purpose." The application of this standard will of course depend upon both the nature of the intended crime and the facts of the particular case. A substantial step in the commission of a robbery may be quite different from that in arson, rape, or some other crime. But this standard does properly direct attention to overt acts of the defendant which convincingly demonstrate a firm purpose to commit a crime, while allowing police intervention, based upon ob-

servation of such incriminating conduct, in order to prevent the crime when the criminal intent becomes apparent.

Reaves' act of climbing onto the store roof with a gun, apparently to lie in wait for the store manager, was plainly a substantial step in the planned robbery, and certainly was strongly corroborative of the criminal purpose. We find no error in the trial court's holding that this conduct could constitute attempted robbery, or in the verdict of the three-judge panel that the defendant Woods was guilty beyond a reasonable doubt.

There was also sufficient evidence from which to conclude that the defendants had not "completely and voluntarily" renounced their criminal purpose. Abandoning an attempt out of fear that the police might be coming cannot reasonably be considered voluntary. Nor is it clear in this case that the attempt was completely abandoned, for the defendants left the car parked near the store and walked away, behavior from which a jury might properly infer that they intended only to wait at a distance and observe whether the robbery might still be possible despite the siren they had heard.[1] We find no error in the guilty verdict rendered by the three-judge panel.

III

At the mitigation hearing held following appellant Woods' conviction, the defense argued that his sentence

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[1] Cf., Model Penal Code, Section 501(4):

"• • • Within the meaning of this Article, renunciation of criminal purpose is not voluntary if it is motivated, in whole or in part, by circumstances, not present or apparent at the inception of the actor's course of conduct, which increase the probability of detection or apprehension or which make more difficult the accomplishment of the criminal purpose. Renunciation is not complete if it is motivated by a decision to postpone the criminal conduct until a more advantageous time or to transfer the criminal effort to another but similar objective or victim."

should be reduced to life imprisonment because it was "unlikely that the offense would have been committed, but for the fact that the offender was under duress [or] coercion • • •," R. C. 2929.04 (B) (2). The evidence presented at the trial and the mitigation hearing indicated that Reaves had been the dominant party in initiating, planning, and carrying out the crime. There was also evidence that Reaves had been involved in criminal gang activities in Chicago. According to Woods' testimony, Reaves bragged of his criminal past and owned a sawed-off shotgun with "initials" cut in the stock for men he had killed. Woods did not claim that he was actually threatened by Reaves, but did assert that he was intimidated by him, wished to back out of the planned robbery, and went along with it unwillingly only after Reaves placed the gun in his hands and told him that all he had to do was stay on the sidewalk and watch for the police. Woods testified that he was reluctant to stay, but that he was afraid of what Reaves might do because of his violent reputation, and that when they were walking away he was only going to talk to the policeman, but that Reaves pushed Woods back and started shooting. Woods said that he had shot at the policeman because he was scared. The examining psychiatrist testified that Woods had no prior record and had been an outstanding athlete in high school. The psychiatrist testified further that Woods was a person "dependent on other people's opinion and leadership," that he "would not offer much objection to being dominated or controlled," and that he probably would not have committed the crime if he had not been under duress, coercion, or strong provocation. Woods' parents also testified on his behalf.[2]

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[2] One difficulty in considering the claims for mitigation in this case is that the pre-sentence report required to be made by statute does not appear in the record. This court bears a special responsibility

The question is whether this evidence was sufficient to justify mitigation of sentence. R. C. 2929.04 (B) provides that the death penalty:

"• • • is precluded when, considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of the following is established by a preponderance [*sic*] of the evidence:

"• • •

"2. It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation."

This language must be strictly construed against the state and liberally construed in favor of the accused. R. C. 2901.04 (A).

In construing and applying the words "duress" and "coercion," we must note first that those terms would be a virtual nullity if they were taken to apply to the legal standard for duress as a defense to a criminal charge.

In the case of the most common type of aggravated murder, purposely causing death in connection with certain felonies, if the defendant has a valid defense of duress to the underlying crime, he can, at most, be convicted of the murder itself, not of aggravated murder, and he would not then be subject to the death penalty.[3] Accordingly, to have

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in capital cases to assure that the ultimate penalty of death be imposed fairly and consistently, and that responsibility requires that we independently evaluate the evidence of aggravation and mitigation upon which each death sentence is based. For that reason, pre-sentence reports and other information relevant to the appropriateness of the death sentence should properly be included in the record of each case brought to this court as a matter of right because the appellant's sentence of death has been affirmed by the Court of Appeals.

[3] There is strong precedent for holding that duress is not a defense to murder, but that question has not been decided in Ohio. At common law, no person can excuse himself for taking the life of an innocent person on the grounds of duress. *Arp* v. *State* (1893), 97 Ala. 5, 12 So. 301; *Watson* v. *State* (1951), 212 Miss. 788, 55 So. 2d 441; *State* v.

any effective meaning, the terms "duress" and "coercion" in R. C. 2929.04 (B) must be construed, if possible, more broadly than when used as a defense in criminal cases. This is particularly true since the defendant is required to establish duress or coercion by a preponderance of the evidence for purposes of mitigation, whereas during trial he is required only to present evidence sufficient to raise such an affirmative defense, and the burden of disproving it beyond a reasonable doubt remains with the prosecution. *State* v. *Robinson* (1976), 47 Ohio St. 2d 103, 351 N. E. 2d 88.

The concepts of duress and coercion are also found in civil law and have broader meaning. The application of those concepts varies greatly, and turns largely upon the circumstances of each individual case, including the character of the one sought to be influenced. As this court held in *Tallmadge* v. *Robinson* (1952), 158 Ohio St. 333, 109 N. E. 2d 496, paragraph two of the syllabus:

"In determining whether a course of conduct results in duress, the question is not what effect such conduct would have upon an ordinary man but rather the effect upon the particular person toward whom such conduct is directed, and in determining such effect the age, sex, health and mental condition of the person affected, the relationship of the parties and all the surrounding circumstances may be considered."

Duress usually connotes some degree of force or threat of force, but duress has also been found when the conduct of one person induces another to enter into a contract against

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Weston (1923), 109 Ore. 19, 219 P. 180; *State* v. *Nargashian* (1904), 26 R. I. 299, 58 A. 953; *Leach* v. *State* (1897), 99 Tenn. 584, 42 S. W. 195. This rule has been modified by statute in some states. *Jones* v. *State* (1950), 207 Ga. 379, 62 S. E. 2d 187; *Paris* v. *State* (1895), 35 Tex. Crim. 82, 31 S. W. 855.

his own volition or judgment, generally out of fear, but also in some cases because of extreme persuasion or pressure of circumstances. 13 Williston on Contracts (3 Ed.), Section 1608. Coercion is generally defined more broadly to include undue influence and other lesser forms of compulsion. It has been said that:

"The words 'coercion' and 'duress' are not synonymous, although their meanings often shade into one another. 'Duress' generally carries the idea of compulsion, either by means of actual physical force or threatened physical force applied to the person (or to some near relative of the person) to be influenced, or applied to the property or reputation of such person. 'Coercion' may include a compulsion brought about by moral force or in some other manner with or without physical force." *McKenzie-Hague Co.* v. *Carbide & Carbon Chemicals Corp.* (C. A. 8, 1934), 73 F. 2d 78, 82. Coercion has been found in a wife's refusal to return to her husband and resume marital relations (*Campbell* v. *Prater* [1948], 64 Wyo. 293, 191 P. 2d 160), and in an employer's warning to striking workers that if they did not return to work by a certain day their jobs would be filled (*N. L. R. B.* v. *Montgomery Ward & Co.* [C. A. 9, 1943], 133 F. 2d 676).

These judicial definitions of coercion correspond to the common use of the word. Webster's Third New International Dictionary defines coercion as "the act of coercing: use of physical or moral force to compel to act or assent," and to coerce as "to restrain, control or dominate, nullifying individual will or desire (as by force, power, violence, or intimidation)."

The essential characteristic of coercion which emerges from these definitions is that force, threat of force, strong persuasion or domination by another, necessitous circumstances, or some combination of those, has overcome the

mind or volition of the defendant so that he acted other than he ordinarily would have acted in the absence of those influences.

This definition appropriately allows consideration of the broad range of information relevant to mitigation set out in R. C. 2929.04, including "the nature and circumstances of the offense and the history, character, and condition of the offender." It also corresponds, as well perhaps as any definition, to the essential purpose of any hearing upon mitigation. The question at that stage is not guilt, for guilt has already been determined. Nor is it primarily whether the standards of conduct imposed by the criminal law have been upheld in order to express society's disapproval of the criminal act and to deter others, for those goals too are largely accomplished by the verdict. Rather, the purpose of mitigation is to recognize that the punishment assigned for a criminal act may, for ethical and humanitarian reasons, be tempered out of consideration of the individual offender and his crime. As the United States Supreme Court has said: "* * * The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender. This whole country has traveled far from the period in which the death sentence was an automatic and commonplace result of convictions * * *." *Williams* v. *New York* (1949), 337 U. S. 241, 247.

Construing R. C. 2929.04 (B) liberally in favor of the accused, we think that the standard stated is appropriate for the trial judge or judges to apply to the facts presented at the mitigation hearing, including the nature and circumstances of the offense and the history, character and condition of the defendant, in making the determination of whether a sentence of death should be reduced to life imprisonment because of duress or coercion.

In the present case, the evidence establishes a consistent portrait of Woods as a young man with no previous criminal record but one who was easily led and who came under the influence of Reaves, the brother of the woman he was living with. It appears likely that it was the influence of Reaves which persuaded Woods to agree to participate in a robbery, to acquiesce and cooperate in the purchase of the gun, and to remain at the scene of the attempted robbery despite his reluctance. All of these are factors which favor the granting of mitigation. Yet the hard fact remains that when the opportunity to abandon the robbery, to surrender to the police, to flee, or even to refrain from firing, was presented, Woods nevertheless opened fire on the wounded officer, despite the fact that Woods was not ordered or even urged to do so. In committing that act, for which punishment under law must now be set, defendant Woods was under neither coercion nor duress, and we can accordingly find no grounds for reducing the sentence of death imposed upon him.

IV

The judgments of the Court of Appeals in 76-155, *State* v. *Reaves*, and 76-137, *State* v. *Woods*, are affirmed.

Judgments affirmed.

O'NEILL, C. J., HERBERT, CORRIGAN, CELEBREZZE, W. BROWN and P. BROWN, JJ., concur.

APPENDIX C

APPELLATE RULES

RULE 4. Appeal as of right — when taken

• • •

(B) Appeals in criminal cases. In a criminal case the notice of appeal by a defendant shall be filed with the clerk of the trial court within thirty days of the date of the entry of the judgment or order appealed from. A notice of appeal filed after the announcement of a decision, sentence or order but before entry of the judgment or order shall be treated as filed after such entry and on the day thereof. If a timely motion in arrest of judgment or for a new trial on any ground other than newly discovered evidence has been made, an appeal from a judgment of conviction may be taken within thirty days after the entry of an order denying the motion. A motion for a new trial on the ground of newly discovered evidence, made after expiration of the time for filing a motion for new trial on other grounds, will not extend the time for appeal from a judgment of conviction. In an appeal by the prosecution, the notice of appeal shall be filed in the trial court within thirty days of the date of the entry of the judgment or order appealed from. A judgment or order is entered within the meaning of this subdivision when it is filed with the clerk of the trial court for journalization.

RULE 5. Appeals by leave of court in criminal cases

(A) Motion and notice of appeal. After the expiration of the thirty day period provided by Rule 4 (B) for the

filing of a notice of appeal as of right in criminal cases, an appeal may be taken only by leave of the court to which the appeal is taken. In such event, a motion for leave shall be filed with the court of appeals setting forth the reasons for the failure of the appellant to perfect an appeal as of right and setting forth the errors which the movant claims to have occurred in the proceedings of the trial court. The motion shall be accompanied by affidavits, or by such parts of the record upon which the movant relies, to show the probability that the errors claimed did in fact occur, and by a brief or memorandum of law in support of the movant's claims. Concurrently with the filing of the motion the movant shall file with the clerk of the trial court a notice of appeal in the form prescribed by Rule 3 and file a copy of the notice of appeal in the court of appeals. The movant shall also furnish a copy of his motion and a copy of the notice of appeal to the clerk of the court of appeals who thereupon shall serve the notice of appeal and a copy of the motion for leave to appeal upon the attorney for the prosecution, who may, within thirty days from the filing of the motion, file such affidavits, parts of the record and brief or memorandum of law to refute the claims of the movant.

(B) Determination of the motion. Except when required by the court the motion shall be determined by the court of appeals on the documents filed without formal hearing or oral argument.

(C) Order and procedure following determination. Upon determination of the motion, the court shall journalize its order and the order shall be filed with the clerk of the court of appeals, who thereupon shall certify a copy of the order and mail or otherwise forward the copy to the clerk of the trial court. In the event that the motion

for leave to appeal is overruled the clerk of the trial court shall collect the costs pertaining to the motion, in both the court of appeals and the trial court, from the movant. In the event that the motion is sustained and leave to appeal is granted the further procedure shall be the same as for appeals as of right in criminal cases, except as otherwise specifically provided in these rules.

RULE 12. Determination and judgment on appeal

(A) Determination. In every appeal from a trial court of record to a court of appeals, not dismissed, the court of appeals shall review and affirm, modify, or reverse the judgment or final order of the trial court from which the appeal is taken. The appeal shall be determined on its merits on the assignments of error set forth in the briefs required by Rule 16, on the record on appeal as provided by Rule 9, and, unless waived, on the oral arguments of the parties, or their counsel, as provided by Rule 21. Errors not specifically pointed out in the record and separately argued by brief may be disregarded. All errors assigned and briefed shall be passed upon by the court in writing, stating the reasons for the court's decision.

CONSTITUTION OF THE STATE OF OHIO
Art. IV, § 2

§ 2. Supreme court.

(A) The supreme court shall, until otherwise provided by law, consist of seven judges, who shall be known as the chief justice and justices. In case of the absence or disability of the chief justice, the judge having the period of longest total service upon the court shall be the acting chief justice. If any member of the court shall be unable, by reason of illness, disability or disqualification, to hear, consider and decide a cause or causes, the chief justice or the acting chief justice may direct any judge of any court of appeals to sit with the judges of the supreme court in the place and stead of the absent judge. A majority of the supreme court shall be necessary to constitute a quorum or to render a judgment.

(B) (1) The supreme court shall have original jurisdiction in the following:

(a) Quo warranto;

(b) Mandamus;

(c) Habeas corpus;

(d) Prohibition;

(e) Procedendo;

(f) In any cause on review as may be necessary to its complete determination,

(g) Admission to the practice of law, the discipline of persons so admitted, and all other matters relating to the practice of law.

(2) The supreme court shall have appellate jurisdiction as follows:

(a) In appeals from the courts of appeals as a matter of right in the following:

(i) Cases originating in the courts of appeals;

(ii) Cases in which the death penalty has been affirmed;

(iii) Cases involving questions arising under the constitution of the United States or of this state.

(b) In appeals from the courts of appeals in cases of felony on leave first obtained.

(c) Such revisory jurisdiction of the proceedings of administrative officers or agencies as may be conferred by law;

(d) In cases of public or great general interest, the supreme court may direct any court of appeals to certify its record to the supreme court, and may review and affirm, modify, or reverse the judgment of the court of appeals;

(e) The supreme court shall review and affirm, modify, or reverse the judgment in any case certified by any court of appeals pursuant to section 3 (B) (4) of this article.

(3) No law shall be passed or rule made whereby any person shall be prevented from invoking the original jurisdiction of the supreme court.

(C) The decisions in all cases in the supreme court shall be reported, together with the reasons therefor. (Amended by 132 v HR 42, eff. 5-7-68; 120 v 743)

APPENDIX D

QUESTIONS RAISED BELOW

COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

C-75047

STATE OF OHIO

vs.

WOODS

FIRST ASSIGNMENT OF ERROR

A defendant may not be convicted of aggravated murder when the state fails to prove that the homicide occurred during the commission of an attempted aggravated robbery.

Where the evidence is insufficient to prove an attempted aggravated robbery the charge must be reduced to murder.

SECOND ASSIGNMENT OF ERROR

Where a defendant proves by clear and convincing evidence that he abandoned his effort to commit an offense under circumstances manifesting a complete and voluntary renunciation of his criminal purpose, the defendant may not be tried for aggravated murder for a homicide committed thereafter.

THIRD ASSIGNMENT OF ERROR

The provisions of Sections 2903.01, 2929.02 and 2929.03, unconstitutionally permit arbitrary imposition of the death penalty in violation of the Eighth and Fourteenth Amendments to the Federal Constitution.

Where an aggravated murder defendant is sentenced to death under Section 2903.03 (B) after a finding of guilt on the specification in Section 2929.04 (A) (7), that defendant has been convicted and sentenced under arbitrary and vague provisions of the new criminal code which do not differ in any constitutionally significant respect from the arbitrary selection process held violate of the Federal Constitution by *Furman* v. *Georgia*.

FOURTH ASSIGNMENT OF ERROR

The death penalty imposed by Section 2929.04, Revised Code, constitutes cruel and unusual punishment prohibited by the Eighth Amendment and Article I, Section 9 of the Ohio Constitution.

OHIO SUPREME COURT

No. 76-155

STATE OF OHIO
vs.
REAVES

PROPOSITION OF LAW I

Timely and specific objection to inquiry into a special venireman's opposition to the death penalty, as a form of punishment, is well taken since the panel shall, pursuant to Revised Code Section 2929.03 B, neither know the consequences of a guilty or not guilty verdict on any charge of Aggravated Murder or any specification, nor participate in the imposition of penalty.

Unless and until a prospective, capital case juror unequivocally states that he or she would automatically vote against a finding of guilt on a charge of Aggravated Murder or a specification thereto, simply to prevent any possible imposition of the death penalty, a challenge for cause, based upon death penalty scruples, cannot be sustained.

PROPOSITION OF LAW II

The statutes of Ohio, permitting the imposition of the death penalty, tolerate, authorize and encourage arbitrary, discretionary and limitless power to include or ignore a specification to a charge of Aggravated Murder, and are, therefore, facially unconstitutional. Crim. R. 11-C(4) which, in part, provides:

> "If the indictment contains one or more specifications and a plea of guilty or no contest to the charge is accepted, the Court *may* dismiss the specification and impose sentence accordingly, in the interests of justice",

vests standard-less discretion in the Trial Court, tolerates arbitrary application, denies uniformity and equality of performance and, coupled with the statutory death penalty machinery, compounds violations of the Eighth and Fourteenth Amendments to the Constitution of the United States.

PROPOSITION OF LAW III

Revised Code Section 2929.04 provides for cruel and unusual punishment in violation of Article I, Section 9 of the Constitution of the State of Ohio.

COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

No. C-75022

STATE vs. REAVES

ASSIGNMENTS OF ERROR

I

The Trial Court substantially erred to the prejudice of Appellant in denying Appellant's Motion to Dismiss for the reason that the provisions of Sections 2903.01, 2929.02, 2929.03 and 2929.04 of the Ohio Revised Code unconstitutionally permit arbitrary imposition of the death penalty in violation of the Eighth and Fourteenth Amendments to the Federal Constitution.

II

The Trial Court substantially erred to the prejudice of Appellant in denying Appellant's Motion to Dismiss for the reason that the death penalty imposed by Section 2929.04 of the Ohio Revised Code constitutes cruel and unusual punishment prohibited by the Eighth Amendment of the Federal Constitution and Article I, Section 9 of the Ohio Constitution.

III

The Court substantially erred to the prejudice of Appellant in permitting the prosecution, during voir dire ex-

amination, to question prospective jurors concerning their feelings and opinions on Capital Punishment, and when it sustained the prosecution's challenges for cause of prospective jurors based on their answers to such inquiries.

OHIO SUPREME COURT

No. 76-137

STATE OF OHIO

vs.

WOODS

PROPOSITION OF LAW No. 1

A defendant may not be convicted of aggravated murder when the state fails to prove that the homicide occurred during the commission of an attempted aggravated robbery.

Where the evidence is insufficient to prove an attempted aggravated robbery the charge must be reduced to murder.

PROPOSITION OF LAW No. 2

Where a defendant proves by clear and convincing evidence that he abandoned his effort to commit an offense under circumstances manifesting a complete and voluntary renunciation of his criminal purpose, the defendant may not be tried for aggravated murder for a homicide committed thereafter.

PROPOSITION OF LAW No. 3

The provisions of Sections 2903.01, 2929.03 and 2929.04, unconstitutionally permit arbitrary imposition of the death penalty in violation of the Eighth and Fourteenth Amendments to the Federal Constitution.

Where an aggravated murder defendant is sentenced to death under Section 2903.03 (B) after a finding of guilt on the specification in Section 2929.04 (A) (7), that defendant has been convicted and sentenced under arbitrary and vague provisions of the new criminal code which do not differ in any constitutionally significant respect from the arbitrary selection process held violative of the Federal Constitution by *Furman* v. *Georgia*.

PROPOSITION OF LAW No. 4

The death penalty imposed by Section 2929.04, Revised Code, constitutes cruel and unusual punishment prohibited by the Eighth Amendment and Article I, Section 9 of the Ohio Constitution.

MOTION F
APR 1 1977

In The

Supreme Court of the United States

October Term, 1976

No. 76-1308

RICARDO WOODS and ROLAND REAVES,
Petitioners,

—v.—

STATE OF OHIO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI, AND BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI, OF THE AMERICAN CIVIL LIBERTIES UNION OF OHIO FOUNDATION, INC.

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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1976
No. 76-1308

RICARDO WOODS and ROLAND REAVES,

Petitioners,

-vs-

STATE OF OHIO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

Motion for Leave to File Brief
Amicus Curiae In Support of Petition
For Writ of Certiorari and
Statement of Interest of Amicus Curiae

The American Civil Liberties Union of Ohio Foundation, Inc., respectfully moves this Court, pursuant to Supreme Court Rule 42(1), for permission to file the attached brief amicus curiae in support of granting the petition for a writ of certiorari. The interest of Amicus Curiae as well as the reasons supporting the motion are set out in the following paragraphs. If the petition for a writ of certiorari is granted,

Amicus further moves, pursuant to Supreme Court Rule 42(2), for permission to file a brief amicus curiae on the merits in support of Petitioners.

(1) The American Civil Liberties Union of Ohio Foundation, Inc. (Foundation) is the separate litigative and educational arm of the American Civil Liberties Union of Ohio (Union). Both the Foundation and the Union are affiliated with the American Civil Liberties Union. The parent and its affiliates comprise a nationwide organization of approximately 400,000 members dedicated to the protection of the rights enumerated in the Bill of Rights, and have been actively involved in the death penalty controversy in judicial, legislative and educational forums in Ohio and elsewhere.

(2) Petitioners are two of more than seventy persons who have been sentenced to death under Ohio's new death sentence scheme. Petitioners are two of the nineteen persons whose death sentences have been affirmed by the Ohio Supreme Court. Any decision to grant or deny the petition for a writ of certiorari must take account of the statutory structure of Ohio's death sentence scheme, the judicial gloss that has been placed upon it by the Ohio Supreme Court, the manner in which that gloss has been applied, and certain aspects of Ohio's substantive law of crimes. As a result of its general concern about the death penalty and its specific involvement in Ohio death cases other than the case at bar, Amicus is uniquely suited to illuminate these issues in greater detail than appears in the Petition.

(3) Counsel for Petitioners has consented to the filing of the attached brief. He has also consented to the filing of an amicus brief on the merits if the petition is granted. The present motion is necessitated because counsel for the State of Ohio has refused consent.

WHEREFORE, movant prays that the attached brief amicus curiae in support of the petition for a writ of certiorari be permitted to be filed with the Court, and that, if the petition is granted, movant be granted permission to file a brief amicus curiae on the merits in support of Petitioners.

Respectfully submitted,

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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1976

No. 76-1308

RICARDO WOODS and ROLAND REAVES,

Petitioners,

-vs-

STATE OF OHIO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTEREST OF AMICUS CURIAE

The interest of Amicus Curiae, American Civil Liberties Union of Ohio Foundation, Inc., has already been stated in the attached motion.

QUESTIONS PRESENTED

(1) Whether Ohio Rev. Code §2929.04(B), as construed and applied by the Ohio Supreme Court, imposes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States by precluding the death sentencer from considering matters which, under contemporary standards of decency, must be considered in mitigation of the death penalty?

(2) Whether Ohio Rev. Code §2929.03(C) violates the right to trial by jury guaranteed by the Sixth and Fourteenth Amendments and imposes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments by precluding any jury input as to the existence of mitigating factors and the appropriateness of the death penalty?

(3) Whether Ohio Rev. Code §§2929.03(E) and 2929.04(B) violate the due process clause of the Fourteenth Amendment by placing on the defendant the burden of proving by a preponderance of the evidence that mitigating factors exist and that he should therefore not be executed?

(4) Whether the scope of review accorded death sentences by the Ohio Supreme Court is adequate, under the Eighth and Fourteenth Amendments, to insure that a death sentence is warranted by the facts of

a particular case and is proportionate to sentences imposed in similar cases?

(5) Whether the Ohio Supreme Court unforseeably interpreted and applied Ohio's law of attempt, in violation of the due process clause of the Fourteenth Amendment, when it held that "casing" the scene of a projected robbery and lying in wait for the prospective victim were encompassed by Ohio Rev. Code §2923.02(A) which defines an act of attempt as "conduct which, if successful, would constitute or result in" robbery?

INTRODUCTORY STATEMENT

Under Ohio's death sentence scheme, the death sentence is mandatory if certain conditions occur. The first condition is that the defendant must be charged with and found guilty of aggravated murder in violation of Ohio Rev. Code §2903.01 (Page 1975).[1] The second condition is that the defendant must be charged with and found guilty of one or more of the seven additional aggravating circumstances enumerated in §2929.04(A).[2]

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[1] Aggravated murder is defined as follows:
a) No person shall purposely, and with prior calculation and design, cause the death of another.
b) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.

[2] The aggravating circumstances are (1) that the offense was the assassination of a specified office-holder or candidate for office; (2) that the offense was committed for hire; (3) that the offense was committed for the purpose of escaping detection, (Cont.)

Once these conditions have been met, the guilt-determining phase terminates, the jury is discharged, §2929.03(C), and the sentencing phase begins. The sentencing phase is strictly a bench proceeding; there is no jury input whatsoever. A pre-sentence investigation and psychiatric examination of the defendant are required, and the court must hear testimony and other evidence, if any. §2929.03(D). Then, §2929.03(E) calls upon the court to determine whether the defendant has established by a preponderance of the evidence, State v. Woods, 48 Ohio St.2d 127, 135, 357 N.E.2d 1059, 1065 (1976), one or more of the mitigating factors specifically enumerated in §2929.04(B).[3] If the court determines

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2/ apprehension, trial or punishment for another offense committed by the offender; (4) that the offense was committed while the offender was a prisoner in a detention facility; (5) that the offender has previously been convicted of an earlier offense the gist of which was the purposeful killing or attempted killing of another, or that the offense involved the purposeful killing of or attempt to kill two or more persons; (6) that the victim was known by the offender to be a law enforcement officer, and either (a) the victim was engaged in his duties at the time of the offense or (b) it was the offender's specific purpose to kill a law enforcement officer; and (7) that the offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary.

3/ The mitigating factors are (1) that the victim of the offense induced or facilitated it; (2) that it is unlikely that the offense would have been committed but for the fact that the offender was under duress, coercion, or strong provocation; and (3) that the (Cont.)

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that the defendant has established none of the mitigating factors by a preponderance, the death penalty is mandatory. If the court finds that one or more of the factors have been established, the death penalty is precluded and a life sentence must be imposed.

Cases in which the death sentence has been imposed are reviewable as a matter of right in the intermediate appellate court. If that court affirms the death sentence, the case is reviewable as a matter of right in the Ohio Supreme Court. Since January 1, 1974, the effective date of Ohio's new criminal code, including the death sentence statutes, more than seventy persons have been sentenced to death in Ohio. As of March 31, 1977, the Ohio Supreme Court had reviewed twenty death sentence cases. In one case, State v. James Lockett, 48 Ohio St.2d 71, 358 N.E.2d 1077 (1976), the Court set aside the conviction and sentence for evidentiary error unrelated to the penalty. In the other nineteen cases, the Court affirmed the conviction and the death sentence.[4]

3/ offense was primarily the product of the offender's psychosis or mental deficiency although such condition is insufficient to establish the defense of insanity.

4/ In order of decision, the cases are State v. Bayless, 48 Ohio St.2d 73, 357 N.E.2d 1035 (1976); State v. Strodes, 48 Ohio St.2d 113, 357 N.E.2d 375 (1976); State v. Woods, 48 Ohio St.2d 127, 357 N.E.2d 1059 (1976)(two cases); State v. Hancock, 48 Ohio St.2d 147, 358 N.E.2d 273 (1976); State v. Roberts, 48 Ohio St.2d 221, 358 N.E.2d 530 (1976); State v. Black, 48 Ohio St.2d 262, 358 N.E.2d 551 (1976); State v. Bell, 48 Ohio St.2d 270, 358 N.E.2d (Cont.)

Petitioners in the case at bar were separately tried and convicted of aggravated murder--killing another while fleeing immediately after attempting to commit aggravated robbery. The aggravating specification of which they were also found guilty was that the victim was a law enforcement officer. Petitioner Reaves was tried by a jury; Woods, by a three-judge court. After the guilt-determining phase was concluded, Petitioners were given psychiatric examinations, and the required pre-sentence report was prepared. Then a mitigation hearing was held. In each case, the bench determined that no mitigating factor had been established by a preponderance of the evidence, and each Petitioner was sentenced to death. After the convictions and sentences were affirmed in separate appeals to the intermediate appellate court, the Ohio Supreme Court consolidated the cases for review and affirmed the convictions and sentences in an opinion styled State v. Woods, supra.

In Reaves' case, the Ohio Supreme Court summarily rejected an attack on the constitutionality of Ohio's death sentence scheme,

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4/ 556 (1976); State v. Bates, 48 Ohio St.2d 315, 358 N.E.2d 554 (1976); State v. Hall, 48 Ohio St.2d 325, 358 N.E.2d 590 (1976); State v. Harris, 48 Ohio St.2d 351, 359 N.E.2d 67 (1976); State v. Royster, 48 Ohio St.2d 381, 358 N.E.2d 616 (1976); State v. Lytle, 48 Ohio St.2d 391, 358 N.E.2d 623 (1976); State v. Ferryman, 49 Ohio St.2d 14, 358 N.E.2d 1040 (1976); State v. Edwards, 49 Ohio St.2d 31, 358 N.E.2d 1051 (1976); State v. Sandra Lockett, 49 Ohio St.2d 48, 358 N.E.2d 1062 (1976); State v. Lane, 49 Ohio St.2d 77, 358 N.E.2d 1051 (1976); State v. Osborne, 49 Ohio St.2d 135, 359 N.E.2d 78 (1976); State v. Miller, 49 Ohio St.2d 198, ___N.E.2d ____ (1977).

citing its earlier decision in State v. Bayless, 48 Ohio St.2d 73, 357 N.E.2d 1035 (1976). Almost as summarily, it rejected Reaves' argument that death-scrupled, prospective jurors had unconstitutionally been excluded from the panel. 48 Ohio St.2d at 130, 357 N.E.2d at 1062. Then it summarily affirmed Reaves' death sentence, making no effort whatsoever to demonstrate that the sentence was warranted by the facts of the case or that it was proportionate to sentences imposed in similar cases. 48 Ohio St.2d at 138, 357 N.E.2d at 1066.

In Woods' case, the court below also summarily rejected a constitutional attack on Ohio's death sentence statutes. It did, however, give more extensive treatment to two other issues: whether Woods had committed attempted robbery by "casing" the scene of a projected robbery and lying in wait for the prospective victim, and whether Woods had established at the mitigation hearing that he had acted under duress.

The attempt issue involved an interpretation of Ohio Rev. Code §2923.02(A) which defines an act of attempt solely as "conduct which, if successful, would constitute or result in the offense." The Court held that the quoted words include conduct that constitutes a substantial step in a course of conduct planned to culminate in the commission of the crime, and that the "substantial step" test had been satisfied on the facts of the case. 48 Ohio St.2d at 130-32, 357 N.E.2d at 1063.

In dealing with the mitigation issue, the Court complained that it did not have the pre-sentence report, 48 Ohio St.2d at 134, n. 2, 357 N.E.2d at 1064, n.2, but nevertheless

proceeded to the merits of the issue. That issue involved an interpretation of Ohio Rev. Code §2929.04(B)(2) which precludes imposition of the death penalty when, by a preponderance of the evidence, it is established that "it is unlikely that the offense would have been committed but for the fact that the offender was under duress, coercion, or strong provocation."

At the outset, the Court recognized (1) that the most common type of aggravated murder in Ohio is felony-murder; (2) that, whether or not duress and coercion are defenses to murder in general, they are defenses in Ohio to the felony that underlies felony-murder; (3) that a felony-murder defendant who prevails on the claim of duress in Ohio is not guilty of a capital offense; (4) that, if a defendant has been found guilty of felony-murder (as he must for the offense to be capital), the verdict is necessarily a statement that, beyond a reasonable doubt, duress did not exist; (5) that such a verdict realistically precludes the defendant from establishing at the mitigation hearing that he was under duress; and (6) that, unless the terms "duress" and "coercion", as mitigating factors, were given a meaning different from their meaning as defensive factors, mitigating duress and coercion would be a "virtual nullity." 48 Ohio St.2d at 135, 357 N.E.2d at 1065. Accordingly, the Court invoked the doctrine of strict construction, and interpreted mitigating duress and coercion to mean, roughly, domination by another or undue influence. 48 Ohio St.2d at 136-7, 357 N.E.2d at 1066.

In applying its own definition, however, the Court abruptly retreated. Ignoring the evidence that Woods was easily led and

dominated by others, that he had no prior record, and that he probably would not have committed the crime had he not been under duress, 48 Ohio St.2d at 134, 357 N.E.2d at 1064, the Court held, seemingly as a matter of law, that Woods was not under duress, as newly defined, because he did not take advantage of opportunity to abandon the robbery, refrain from shooting, surrender to police, or flee. 48 Ohio St.2d at 138, 357 N.E.2d at 1066. With the failure of mitigating duress, the death penalty was mandatory, and the Court therefore affirmed the sentence.

REASONS FOR GRANTING THE WRIT

It is apparent from the Introductory Statement that Ohio's death sentence scheme, as construed and applied in the case at bar, is unlike any of the three schemes upheld by this Court last year in the second round of death penalty cases. The categories of mitigating factors recognized by Ohio Rev. Code §2929.04(B) are sparse, and the Ohio Supreme Court's application of the duress factor has been excessively narrow and restrictive; there is no jury participation in the sentencing decision; the defendant bears the burden of establishing at the mitigation hearing that he should not be executed; and the review accorded death sentences by the Ohio Supreme Court is undiscriminating, as is demonstrated by even a cursory glance at the decision below.

Resolution of these issues, however, cannot be confined to the case at bar, for what is involved is not merely how Ohio's law was applied in the isolated setting of a single case, but also the rationality, fairness, and basic decency of the entirety

of Ohio's statutory scheme as applied by the Ohio Supreme Court in a wide range of cases. Gregg v. Georgia, 96 S. Ct. 2909, 2938 (1976). A consideration of Ohio's law from this broader perspective will, we submit, reveal that, although Ohio's law is not identical to the North Carolina and Louisiana laws invalidated in Woodson v. North Carolina, 96 S. Ct. 2978 (1976); and Roberts v. Louisiana, 96 S. Ct. 3001 (1976), it affronts the very concerns underlying those cases, and therefore raises the most substantial constitutional questions.

(1) Constitutional Insufficiency of Ohio's Law of Mitigation.

Ohio Rev. Code §2929.04(B) recognizes three categories of mitigating factors. A brief consideration of each category and, where available, its judicial gloss will show that Ohio's scheme is virtually bereft of mitigation.

a) Ohio Rev. Code §2929.04(B)(1) deems mitigating that the victim of the offense induced or facilitated it. This mitigating factor has not arisen in any reported case; nor is it ever likely to arise, for it is illusory. In the absence of judicial interpretation, we must make the educated guess that the factor is limited to mercy killing, for that seems to be its plain meaning. It strains credulity to posit that a mercy killer would even be charged with aggravated murder, let alone be convicted of it. Of greater importance, however, is the fact that no mitigating factor becomes relevant until the defendant has also been convicted of one or more of the aggravating specifications listed in §2929.04(A). The aggravating circumstances, however, are so inconsistent with mercy killing, that conviction of any

aggravating specification will preclude the defendant from claiming mercy killing. To illustrate the point, we refer to §2929.04(A)(7)'s aggravating specification of felony-murder which is the most common form of aggravation under Ohio law. One who has been convicted of aggravated murder and an additional specification of felony-murder of the same victim will simply never be able to assert mercy killing. What is true of the aggravating circumstance of felony-murder is also true of the other aggravating circumstances. Hence, mitigating inducement is illusory.

b) Ohio Rev. Code §2929.04(B)(2), the section involved in the case at bar, provides for mitigation if "it is unlikely that the offense would have been committed but for the fact that the offender was under duress, coercion, or strong provocation." As is clear from our Introductory Statement, mitigating duress and coercion, as applied by the court below in the case at bar, is practically worthless. The point is buttressed by State v. Bell, 48 Ohio St.2d 270, 358 N.E.2d 556 (1976). In Bell, the Court purported to expand the definition of duress and coercion by holding that youth and absence of a prior record were relevant considerations. 48 Ohio St.2d at 281, 358 N.E.2d at 564. Then, ignoring the evidence that Bell was 16, 48 Ohio St.2d at 270, 358 N.E.2d at 559, and that he was easily influenced by his adult companion, Hall, the Court affirmed the death sentence on the ground that Bell did not get away from Hall when he could have, and that he joined Hall in another criminal venture the next day. 48 Ohio St.2d at 282, 358 N.E.2d at 364-65.

In neither Woods nor Bell did the Court even allude to the obvious: that one who is easily led or influenced by another is simply

not likely to break the relationship and escape. As applied by the court below, mitigating duress and coercion are useless. Neither concept permits the sentencer to make the kind of judgment about comparative blameworthiness that Woodson and Roberts require.

The third mitigating factor mentioned in §2929.04(B)(2) is "strong provocation." This factor has not been interpreted in any reported case, so we cannot be certain of its scope. Nevertheless, it is a fact that strong provocation cannot exist in conjunction with some of the aggravating circumstances--for example, that the killing was for the purpose of escaping detection--and it is unlikely that "strong" provocation would exist in conjunction with others--for example, killing for hire or, to refer again to the most common example, felony-murder. Beyond this, however, is the fact that, under Ohio Rev. Code §2903.03, a killing that would otherwise be murder is reduced to manslaughter if it resulted from "...extreme emotional stress brought on by serious provocation reasonably sufficient to incite [the defendant] into using deadly force..." In the absence of relevant case law, the relationship between reductive provocation and mitigating provocation cannot be illuminated. It does appear, however, that, if the Ohio Supreme Court either interprets or applies mitigating provocation narrowly, it will be swallowed up by reductive provocation and will cease to exist. Given the already narrow application of duress and coercion, that is quite likely to occur.

c) Ohio Rev. Code §2929.04(B)(3) treats as mitigating that the crime "...was primarily the product of the offender's psychosis or

mental deficiency, though such condition is insufficient to establish the defense of insanity." The question raised by this section is whether its definition of mitigating mental condition differs in any significant respect from Ohio's case law definition of insanity as a defense. If it does not, then a verdict that the defendant is guilty of capital murder, which necessarily entails a finding that he was sane, would effectively preclude the defendant from asserting this form of mitigation.

From the face of §2929.04(B)(3), it is clear that the legislature intended to distinguish mitigating from exculpating mental condition. The question, however, is not what the legislature intended, but whether it succeeded, and, if not, whether the legislative failure has been rectified by judicial interpretation and application. Ohio's insanity defense is defined as follows:

> One accused of criminal conduct is not responsible for such criminal conduct if, at the time of such conduct, as a result of mental disease or defect, he does not have the capacity either to know the wrongfulness of his conduct or to conform his conduct to the requirements of the law.

State v. Staten, 18 Ohio St.2d 13, 247 N.E.2d 293 (1969)(syllabus 1). This definition surely suggests no easy differentiation from mitigating mental condition (whether the crime "was primarily the product of the offender's psychosis or mental deficiency"). Thus, if there is any difference between them, it must reside in Ohio's case law.

The Ohio Supreme Court has dealt with mitigating mental condition in five capital cases. It would unduly prolong this brief to discuss each of the cases in detail. Suffice it to say, therefore, (1) that the Court has read the mitigating condition narrowly by recognizing that it does not cover all mental disorders and by limiting "mental deficiency" to low intelligence or retardation, State v. Bayless 48 Ohio St.2d at 87, 95-6, 357 N.E.2d at 1046, 1050-51 (thus blurring the distinction between mitigation and exculpation), while, in the very next case, reading the same language expansively to accord the sentencer "the broadest possible latitude" by holding that "any mental state or incapacity may be considered" short of the defense of insanity. State v. Black, 48 Ohio St.2d at 268, 358 N.E.2d at 555-56; (2) that the Court has compounded confusion by explicitly refusing to define "psychosis or mental deficiency" on the ground that "to define such terms is to narrow them," ibid., thus abandoning sentencers on an uncharted sea that most conduces to the freakish or wanton imposition of the death penalty; (3) that the Court has stated that the defendant's youth is a "primary factor" in determining "mental deficiency" (without indicating how that could possibly be the case), while simultaneously upholding a death sentence imposed on a 16 year old offender, State v. Bell, 48 Ohio St.2d at 270, 282, 358 N.E.2d at 559, 565; see also State v. Harris, 48 Ohio St.2d 351, 359 N.E.2d 67 (1976)(death sentence imposed on juvenile sociopath); and (4) that, its expansiveness in State v. Black, supra, notwithstanding, the Court has upheld the death sentence in every case in which mitigating mental condition was raised. See cases cited supra, and State v. Edwards, 49 Ohio St.2d 31, 358 N.E.2d 1051 (1976).

Taken as a whole, the Court's cases either fail to draw any distinction between mitigation and exculpation, thus rendering mitigation illusory, or so confound matters that the mitigating condition cannot be applied even-handedly as a result of the very gloss that the Court has given it.

d) Ohio Rev. Code §2929.04(B) requires the sentencer to determine whether, "considering the nature and circumstances of the offense and the history, character, and condition of the offender," a statutory mitigating factor has been established by a preponderance of the evidence. Under cover of the quoted words, the Ohio Supreme Court has stated, as indicated above, that the defendant's youth is relevant to determining mitigating duress, coercion, or mental condition; that absence of a prior record is relevant to the determination of duress and coercion, and that duress includes undue domination by another. That these statements are insubstantial (perhaps cosmetic) is indicated by the following: (1) none of the additional factors (youth, etc.) has relevance independent of the statutory factors; (2) in no case has the Court even tried to explain how youth or absence of a record might be relevant to any of the statutory factors; (3) in no case has the Court set aside a death sentence where the defendant was young or had no prior record or acted under the influence of another. Thus, the illusory nature of the statutory factors cannot be overcome by reference to additional factors.

e) It is apparent from the description of Ohio's capital-sentencing system, as interpreted and applied by the Ohio Supreme

Court, that the statutory mitigating factors are illusory or intolerably narrow at best; that this profound deficiency cannot be remedied by resorting to additional mitigating factors; and that the sentencer in Ohio is therefore precluded from considering matters which, in many other states, would serve to mitigate the death penalty. Because "...the penalty of death is qualitatively different from a sentence of imprisonment, however long...there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." Woodson v. North Carolina, supra at 2992. Ohio law does not permit a reliable determination of the appropriateness of the death penalty. Although Ohio's law is not identical to the invalidated laws of North Carolina and Louisiana, Amicus submits that it is too close to survive constitutional scrutiny. The matter is, of course, one of degree. But it is also one of life or death.

Amicus is aware that this Court has recently heard argument in Roberts v. Louisiana, #76-5206 (Roberts II), which involves, as does the case at bar, the killing of a police officer. As the facts of the case at bar dramatically illustrate, however, even those who jointly participate in the killing of a police officer may not be blameworthy in the same degree. Hence, Amicus would urge this Court not to depart, in deciding Roberts II, from its holdings in Woodson and Roberts I. Should this Court, however, choose to create a special rule for the killing of a police officer, that would still not control the outcome of the case at bar, for the instant case involves important constitutional issues in addition to the sufficiency of Ohio's law of mitigation.

(2) Preclusion of Jury Participation in the Capital-Sentencing Process.

Prior to Furman v. Georgia, 408 U.S. 238 (1972), the capital-sentencing decision in Ohio was entrusted solely to the jury unless the defendant waived trial by jury on the merits, in which event both trial and sentencing were handled by a three-judge court. Believing that compliance with Furman precluded jury sentencing, see Lehman and Norris, Some Legislative History and Comments on Ohio's New Criminal Code, 23 CLEVE. ST. L.REV. 8, 16-17, 20 (1974), a judgment that was proved wrong by Gregg v. Georgia, 96 S. Ct. 2909 (1976), the Ohio legislature enacted §2929.03(C) which remits the sentencing decision to one or three judges, depending on whether or not guilt was determined by a jury, and bars even advisory participation by the jury.

In the pre-Furman era, jury participation in the capital-sentencing process was so deeply rooted as to be axiomatic. See Woodson v. North Carolina, supra at 2985. Although this Court "has never suggested that jury sentencing is constitutionally required," Proffitt v. Florida, 96 S. Ct. 2960, 2966 (1976), and has opined that judicial sentencing should lead to greater consistency, ibid., it has neither considered nor approved any post-Furman death penalty statute that totally excluded the jury. Even the Florida statute sustained in Proffitt wrought but a limited encroachment upon the tradition that only a jury may impose a death sentence. Id. at 2965. By contrast, Ohio's statute bars even advisory participation by the jury, and therefore raises substantial Sixth and Eighth Amendment questions.

From a Sixth Amendment perspective, it is clear that the kinds of issues raised at an Ohio mitigation hearing are well within the traditional role of juries in criminal cases. Inducement by the victim is comparable to the substantive issue of consent; duress, coercion and provocation have defensive or reductive counterparts; and mitigating mental condition is analogous to the defense of insanity. In terms of issues, therefore, there is no justification for barring jury participation in the determination of sentence.

Under Ohio's scheme, issues of aggravation go to the merits. Ohio Rev. Code §2929.03(B) and (C). Consequently, they are, and must be, jury triable. Yet, aggravation and mitigation are, in Ohio, really reverse sides of the same coin: determining whether the offense is non-capital murder, in which event the death penalty is precluded, or whether it is capital, in which event the death penalty is mandatory. In effect, Ohio law recognizes the following gradations of murder: simple murder (§2903.02), punishable by fifteen years to life (§2929.02); aggravated murder (§2903.01), punishable by life imprisonment (§2929.02); doubly aggravated murder (§§2903.01 and 2929.04(A)) with a mitigating factor (§2929.04(B)), also punishable by life imprisonment (§2929.02); and capital murder, i.e., doubly aggravated murder without any mitigating factor, for which the death penalty is mandatory. Once this structure is recognized, it becomes clear that issues of mitigation actually go to the degree of guilt, with preclusive or mandatory consequences on sentence, and that the issues should be jury triable under the Sixth Amendment. See United States v. Kramer, 289 F.2d 909, 921 (2d Cir. 1961).

From an Eighth Amendment perspective, it is clear that determining the validity of capital-sentencing statutes crucially involves "ascertaining contemporary standards of decency." Woodson v. North Carolina, supra at 2987. In Witherspoon v. Illinois, 391 U.S. 510, 519, n. 15 (1968), this Court, citing the Eighth Amendment case of Trop v. Dulles, 356 U.S. 86, 101 (1958), observed that "...one of the most important functions any jury can perform...is to maintain a link between contemporary community values and the penal system--a link without which the determination of punishment could hardly reflect 'the evolving standards of decency that mark the progress of a maturing society.'" Although that observation was made in the context of a system of uncontrolled jury discretion, it is also vital where discretion is controlled. See Gregg v. Georgia, supra at 2933. Ohio's law does not reflect a legislative judgment to the contrary, even if such a judgment were permissible. As noted above, the Ohio legislature apparently believed that compliance with Furman precluded jury participation of any sort. That judgment, proved erroneous by Gregg, now raises substantial constitutional questions which should be resolved by this Court.

(3) Unconstitutionality of Allocating Burden of Proof to Defendant.

Ohio Rev. Code §§2929.03(E) and 2929.04(B) force the defendant to establish by a preponderance of the evidence one or more of the mitigating factors enumerated in §2929.04(B). State v. Woods, 48 Ohio St.2d at 135, 357 N.E.2d at 1065. The Ohio Supreme Court has summarily upheld the constitutionality of this procedure. State v. Sandra Lockett, 49 Ohio St.2d at 65-66, 358 N.E.2d at 1074. In

In re Winship, 397 U.S. 358 (1970), this Court interpreted the due process clause in a criminal case to require allocation to the prosecution of the burden of proving beyond a reasonable doubt every essential element of guilt. As we have argued in Point 2, supra, mitigation does go to the question whether the defendant is guilty of capital murder. Hence, under Winship the state should be required to bear the burden. But the result would be no different even if mitigation were regarded as going solely to punishment, for the reach of the Winship rule was broadened in Mullaney v. Wilbur, 421 U.S. 684 (1975), when this Court invalidated a Maine procedure which placed on the defendant the burden of proving by a preponderance the existence of provocation to reduce murder to manslaughter. In most states, provocation is an element, and the prosecution must negate it beyond a reasonable doubt to sustain a murder charge. In Maine, however, provocation was not an element; there was but a single generic offense of voluntary criminal homicide, and the labels "murder" and "voluntary manslaughter" described only "punishment categories." Id. at 689; see also id. at 688, 691, 699. Even though provocation was not an element under Maine law, this Court held that Winship was applicable given the disparity in sentences for murder and manslaughter and the consequent importance of reliably determining the applicable category. Id. at 700-01. This Court regarded it as "intolerable," id. at 703, to impose a more severe sentence on the defendant "...when the evidence indicates that it is as likely as not that he deserves a significantly lesser sentence." Ibid. (Emphasis added.) In Woodson v. North Carolina, supra at 2992, this Court recognized the qualitative difference between a death sentence and any sentence to imprisonment. Under Ohio's burden of proof, a

defendant can be killed when the evidence indicates that it is as likely as not that he deserves to live, although in a prison. For sheer intolerability, this beggars the concern that was voiced in Mullaney. Amicus respectfully suggests that Ohio's burden of proof raises a most serious constitutional question.

(4) Eighth Amendment Adequacy of Scope of Review by Ohio Supreme Court.

Plenary review of death sentences by a state's highest court--the only court with statewide jurisdiction--is an important procedural safeguard against the arbitrary and capricious imposition of the death penalty, Gregg v. Georgia, supra at 2937, for it helps to insure not only that the death penalty is appropriate when measured by the facts of a particular case, but that it is proportionate to sentences imposed in similar cases. Although death-sentence cases are reviewable as a matter of right in Ohio's appellate courts, including the Ohio Supreme Court, it was generally believed in the pre-Furman era that no Ohio reviewing court had the authority to set aside a death sentence as excessive or inappropriate. See McGautha v. California and Crampton v. Ohio, 402 U.S. 183, 195, n. 7 (1971). However, in State v. Bayless, supra at 86, 357 N.E.2d at 1045, the Ohio Supreme Court stated that it would "independently review the aggravating and mitigating circumstances presented by the facts of each case to assure ourselves that capital sentences are fairly imposed by Ohio's trial judges." That the Court has not kept its promise with fidelity to Eighth Amendment values is strongly suggested by the following:

a) In State v. Edwards, supra at 47,

358 N.E.2d at 1062, the Court, citing a pre-Furman capital case, State v. Cliff, 19 Ohio St.2d 31, 249 N.E.2d 823 (1969), explicitly stated that "in criminal appeals this court will not retry issues of fact [relating to mitigation]. In the circumstances at hand, we confine our consideration to a determination of whether there is sufficient substantial evidence to support the verdict rendered." The "substantial evidence" test in Ohio, however, as State v. Cliff, supra, makes clear, is an inordinately narrow test, for the verdict or sentence will be sustained under it unless no reasonable mind could reach the same conclusion. Whatever the merits of the "substantial evidence" test as a device for appellate review in non-capital cases, it surely does not suffice in capital cases to insure that the death penalty is appropriate when measured by the facts of a particular case, especially when the burden of proving mitigation is on the defendant. In stark contrast to Ohio's procedure is the Florida procedure sustained in Proffitt, supra at 2966, "under which the evidence of the aggravating and mitigating circumstances is reviewed and reweighed by the Supreme Court of Florida" (emphasis added).

b) In none of the nineteen cases in which the Ohio Supreme Court has sustained the death sentence has it even attempted to compare the case with any other case in which the death sentence was imposed or with any case in which the death sentence was averted.

c) In several cases, as indicated earlier, the Ohio Supreme Court has purported to interpret various mitigating factors broadly for the benefit of the defendant. These expansive readings could hardly have

been anticipated by the trial judges who imposed the death sentence, and it is likely that they used narrower standards in holding that mitigation had not been proved. Despite this, the Ohio Supreme Court has not remanded a single case for a new sentencing hearing to be conducted pursuant to the newly articulated standards. Rather, in every case, the Court has simply reviewed the record as made, without even inquiring whether the standards used by the sentencer were compatible with the standards thereafter announced.

d) As noted in the Introductory Statement, the Ohio Supreme Court, in the case of Petitioner Woods, while complaining that it had not received the presentence report, proceeded to review the record without it, and affirmed the death sentence. The impropriety of this practice is strongly suggested by Gardner v. Florida, 45 U.S. L.WEEK 4275 (U.S. March 22, 1977).

e) In Proffitt v. Florida, supra at 2967, this Court observed that the Florida Supreme Court had set aside the death sentence in eight of twenty-one cases, thus evidencing scrupulous appellate review. The Ohio Supreme Court has reviewed twenty death-sentence cases. It has set aside the conviction and sentence in one for evidentiary error unrelated to the penalty. In each of the nineteen remaining cases, however, it has affirmed the death sentence.

Whether Ohio's system of appellate review is adequate to comply with Eighth Amendment standards is a substantial constitutional question which should be resolved by this Court.

(5) Retroactive Application of Ohio Law of Attempt.

The convictions and death sentences in the case at bar rest importantly on the allegation that the killing occurred while the Petitioners were fleeing immediately after attempting to commit robbery. Ohio Rev. Code §2903.01(B). In Ohio, as elsewhere, an attempt comprises an act coupled with a mental element. Ohio Rev. Code §2923.02(A). Various tests have been used to determine whether an "act of attempt" occurred. The narrowest test, most favorable to a defendant, is the "last proximate act" test which requires that the defendant "have done everything which he believes necessary to bring about the intended result." W.LaFAVE & A.SCOTT, CRIMINAL LAW 433 (1972). A much broader test, much less favorable to a defendant, is the "substantial step" test which asks whether the defendant's conduct was a substantial step in a course of conduct planned to culminate in the crime. Id. at 436. Ohio Rev. Code §2923.02(A) defines an act of attempt exclusively as "conduct which, if successful, would constitute or result in the offense." The plain meaning as well as the drafting history of this section leave no doubt that the quoted words describe the "last proximate act" test and not the "substantial step" test. Memorandum from Legislative Service Commission Staff to Criminal Law Technical Committee (the drafting committee), January 30, 1967, pp. 7, 14.

In the case at bar, the defendants "cased" the scene of a projected robbery and lay in wait for the prospective victim. It is arguable that their conduct constituted a "substantial step". It is beyond argument that their conduct did not constitute the "last proximate act". See Memorandum, supra

at 14. The Ohio Supreme Court, however, abandoned the doctrine of strict construction and its underlying policy of fair warning, United States v. Bass, 404 U.S. 336, 348 (1971), totally ignored both plain meaning and legislative history, interpreted the statute broadly in favor of the State, held that it encompassed the "substantial step" test, and applied that test retroactively to the case at bar. State v. Woods, supra at 130-32, 357 N.E.2d at 1063. Although that holding, insupportable though it may be, now states the law of Ohio, its retroactive application to the case at bar raises a substantial due process question. See Bouie v. City of Columbia, 378 U.S. 347, 362-63 (1964).

CONCLUSION

For the foregoing reasons, Amicus respectfully submits that the Petition for a Writ of Certiorari should be granted.

LAWRENCE HERMAN

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Supreme Court, U. S.
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IN THE

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OCTOBER TERM 1976

No. 76-1308

RICARDO WOODS and ROLAND REAVES,
Petitioners,

vs.

STATE OF OHIO,
Respondent.

OBJECTION TO MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

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Respondent.

OBJECTION TO MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Now comes the State of Ohio, Respondent, by Simon L. Leis, Jr., Prosecuting Attorney, Fred J. Cartolano, First Assistant Prosecuting Attorney, Leonard Kirschner, Assistant Prosecuting Attorney and Robert R. Hastings, Jr., Assistant Prosecuting Attorney, and do hereby object to the American Civil Liberties Union filing an Amicus Curiae brief in this matter.

Counsel for the respondent do hereby submit that Amicus Curiae in this case has endeavored to circumvent the rules of this Court requiring leave to be first granted before the Brief is filed by the devious means of attaching said brief to their Motion for Leave.

The decision upon which Certiorari was filed was initially rendered by the Supreme Court of Ohio on or about December 1, 1976. Counsel for the Petitioner in this case filed his Petition for Writ of Certiorari on or about March 21, 1977. The Amicus in this matter was well aware of the progress and status of the case; but delayed filing any Motion in this Court until approximately three weeks after the original Petition had been filed and after the Respondent's brief had been completed and at the printers for printing and submission to this Court. We therefore submit that under the circumstances the filing of the Brief of Amicus Curiae at this stage of the proceeding is not timely.

We further submit that the Motion for Leave to File the Brief of Amicus Curiae has not complied with Rule 42 (3) of this Court which provides:

> ". . . It shall concisely state the nature of the applicant's interest, set forth facts or questions of law that have not been or reasons for believing that they will not adequately be, presented by the parties, and their relevancy to the disposition of the case . . . ."

We respectfully submit that counsel for Amicus Curiae has failed to set forth any facts or questions of law that have not been, or reasons for believing that they will not adequately be, presented by the parties.

We further submit that counsel for the petitioners is a knowledgeable, seasoned practicing criminal lawyer with over 25 years of practice before the bar of the State of Ohio. He has recently been one of the members of a special commission appointed by the Supreme Court of Ohio in the drafting of the new Ohio Rules of Criminal Procedure. He is currently, and has been for a number of

years, Professor of Criminal Law at Salmon P. Chase College of Law. He also has authored one of the two basic texts and annotations on criminal law and procedure under the new criminal code in Ohio.

We submit this background of counsel for the petitioners to the Court because we believe that there is no reason for Amicus Curiae briefs where petitioners are represented by capable, competent legal counsel. This is especially true where it appears that counsel for the Amicus Curiae has not set forth any facts or questions of law that have not been raised or adequately presented by petitioners' counsel.

CONCLUSION

In conclusion we object to the American Civil Liberties Union filing a Brief of Amicus Curiae for any one or all of the hereinafter stated reasons:

1. They are endeavoring to file a brief by means of attaching it to a Motion for Leave;
2. They have filed their Motion and Brief more than three weeks after the Petition for Certiorari was filed and after Respondent's brief was at the printers, even though over three months had passed in which amicus could have prepared a motion.
3. The petitioners are represented by capable counsel.
4. They have failed to set forth in accordance with Rule 42 (3) any facts or questions of law that have not been raised or adequately presented by petitioners' counsel.

5. A Motion to file a brief by Amicus Curiae on a Petition for Certiorari is not favored (Rule 42 (1)).

Respectfully submitted,

SIMON L. LEIS, JR.
Prosecuting Attorney

FRED J. CARTOLANO
First Asst. Prosecuting Attorney

LEONARD KIRSCHNER
Assistant Prosecuting Attorney

ROBERT R. HASTINGS, JR.
Assistant Prosecuting Attorney

Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-1308

RICARDO WOODS AND ROLAND REAVES,
Petitioners,

vs.

STATE OF OHIO,
Respondent.

REPLY BRIEF OF RESPONDENT IN OPPOSITION TO BRIEF OF AMICUS CURIAE

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REPLY BRIEF OF RESPONDENT IN OPPOSITION TO BRIEF OF AMICUS CURIAE

QUESTIONS PRESENTED

The following questions are presented in Amicus Curiae Brief. It is to be noted that questions II through IV were not raised or preserved by Petitioners below and that Petitioners have not raised question V in their Petition for Writ of Certiorari. Petitioner Reaves has never raised any evidentiary issue in the state Courts.

(1) Whether Ohio Revised Code 2929.04 (B), as construed and applied by the Ohio Supreme Court, imposes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States?

(2) Whether Ohio Revised Code 2929.03 (C) violates the right to trial by jury guaranteed by the Sixth and

Fourteenth Amendments and imposes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments by precluding any jury input as to the existence of mitigating factors and the appropriateness of the death penalty?

(3) Whether Ohio Revised Code 2929.03 (E) and 2929.04 (B) violate the due process clause of the Fourteenth Amendment by placing on the defendant the burden of proving by a preponderance of the evidence that mitigating factors exist and that he should therefore not be executed?

(4) Whether the scope of review accorded death sentences by the Ohio Supreme Court is adequate, under the Eighth and Fourteenth Amendments, to insure that a death sentence is warranted by the facts of a particular case and is proportionate to sentences imposed in similar cases?

(5) Whether the Ohio Supreme Court unforseeably interpreted and applied Ohio's law of attempt, in violation of the due process clause of the Fourteenth Amendment, when it held that "casing" the scene of a projected robbery and lying in wait for the prospective victim were encompassed by Ohio Rev. Code 2923.02 (A) which defines an act of attempt as "conduct which, if successful, would constitute or result in" robbery?

INTRODUCTORY STATEMENT

Roland Reaves and Ricardo Woods, Petitioners herein, planned a robbery during the afternoon of July 16, 1974. To help accomplish that purpose they purchased a .38 caliber revolver from a friend. At approximately midnight they drove Reaves' car to Copelen Street where they parked. As they approached the United Dairy Farmer store they were armed with the .38 caliber revolver and a .22 caliber handgun.

Petitioners then began to "case" the store which was located on Florence Avenue. As they were doing this the acting manager of the store was inside ringing out the cash registers for the day and preparing to make a nightly bank deposit which totaled over $2,000 on that particular night. While they stood outside the store Petitioners observed the manager indicate to two other men that the store was closed. Petitioner Woods then stood by a bus stop across the street from the store while Petitioner Reaves climbed onto the roof of the one-story store.

Shortly after midnight on July 17, 1974, the Cincinnati Police received a telephone call from a woman who said that she had seen a man on the roof of the United Dairy Farmers store on Florence Avenue. That information was broadcast to patrol cars in the area and several officers responded. One of the officers, Patrolman Kramer observed the Petitioners looking over their shoulders while walking on Florence Avenue in the vicinity of the store, and he reported that information over the police radio. Another officer, Patrolman David Cole, also responded to the broadcast and was approaching the scene along Florence Avenue.

As Patrolman Cole observed the Petitioners he jammed on the brakes of his police cruiser and skidded to a stop next to the curb. Patrolman Cole started to get out of his

cruiser when Petitioner Woods stuck his head through the passenger window to talk to the officer. As Petitioner Woods did this Patrolman Cole exited from the cruiser and moved toward the rear of the cruiser. Just as Petitioner Woods pulled his head out of the window to see where Patrolman Cole had gone Petitioner Reaves started firing his weapon. The first bullet struck Patrolman Cole in the chest. Petitioner Reaves continued firing three or four shots in all.

Petitioner Woods fired his .22 caliber pistol at Patrolman Cole, striking him in the back, as Petitioners started running away. As they ran down the street Patrolman Cole, lying bleeding on the ground, fired three shots at them.

Patrolman Cole was pronounced dead on arrival at the hospital, and the subsequent autopsy and ballistics examination disclosed that he had been shot by both a .22 and a .38 caliber weapon.

Petitioner Reaves was arrested on July 18th, 1974, in Cincinnati, Ohio and subsequently made statements to investigating officers which implicated Petitioner Woods. Petitioner Woods was arrested on July 19th, 1974, in West Virginia at the home of his mother. After the arrival of Cincinnati police, Petitioner Woods made a complete statement as to his part in the events leading up to and following the homicide.

As was pointed out in Respondent's Brief in Opposition to the Petition for Writ of Certiorari in response to *Furman* v. *Georgia*, 408 U.S. 238 (1977) the Ohio legislature enacted Sections 2929.02, 2929.03 and 2929.04 of the Ohio Revised Code.

Those sections provide for a bifurcated trial in a capital case. Capital cases in Ohio are limited to cases involving aggravated murder accompanied by a specific statutory aggravating circumstance. Both the charge of aggravated

murder and the specification must be proved beyond a reasonable doubt. If both have been proved then the trial court or three-judge panel acts as the sentencer. Before a death sentence may be imposed there must be a unanimous finding that none of the statutory mitigating circumstances have been established by a preponderance of the evidence.

ARGUMENT

I.

In considering mitigating factors the sentencer is to take into consideration the nature and circumstances of the offense and the history, character, and condition of the defendant. The Supreme Court of Ohio has repeatedly held that the mitigating circumstances are not to be construed narrowly and that relevant factors, such as prior criminal record and the age of the defendant, are to be considered by the sentencing authority, *State* v. *Bell*, 48 Ohio St. 2d 270, 280-283 (1976); *State* v. *Black*, 48 Ohio St. 2d 262, 267-268 (1976); *State* v. *Woods*, 48 Ohio St. 2d 127, 133-138 (1976); and *State* v. *Osborne*, 49 Ohio St. 2d 135, 145-147.

Contrary to Amicus' assertion that the mitigating factor contained in Section 2929.04 (B) (1) is limited to mercy killing, the Respondent asserts it could apply in cases where the course of conduct engaged in by the defendant fell short of self-defense; where during the perpetration of a felony a co-defendant is killed; and where the victim is masochistic in nature in a death which results from a physical beating. The Supreme Court of Ohio reviewed

the record in *State* v. *Bates,* 48 Ohio St. 325 (1976) to determine if sufficient evidence existed to establish the mitigating factor as set forth in Section 2929.04 (B) (1).

The mitigation standards set forth in the Ohio Revised Code are no different than those found in the Model Penal Code or the Florida statutes. And they are no more narrow than the questions the jury must answer in Texas before the death penalty can be imposed, *Jurek* v. *Texas,* — U.S. —, 96 S. Ct. 2950, 2955 (1976). In fact, this Court held that Georgia's statutory scheme which provides for the death penalty passed constitutional muster despite the fact that no mitigating circumstances are defined by statute. Thus, in Georgia the scope of the nonstatutory mitigating circumstances are not delineated by statute. The defendant is afforded substantial latitude as to the types of evidence that he introduces.

It is submitted that Ohio's mitigating circumstances provide standards which channel and guide the discretion of the sentencing authority so as to avoid arbitrary and capricious imposition of the death penalty.

II.

As was pointed out in Respondent's Brief in Opposition the issue of exclusion of the jury in the sentencing process in a capital case was not raised or preserved below.

This Court has never suggested that jury sentencing is constitutionally required. In *Proffitt* v. *Florida,* — U.S. —, 96 S. Ct. 2960 (1976) this Court upheld Florida's statutory scheme which provides only for an advisory jury verdict in the sentencing process.

It is submitted that judicial sentencing does not deprive a defendant of any constitutional right. A system of judicial sentencing should lead to greater consistency in the

imposition of capital punishment due to the experience a trial judge has in sentencing procedures.

Prior to *Furman* v. *Georgia,* supra, the Supreme Court of Ohio held that there is no constitutional provision prohibiting a three-judge panel from determining the degree of guilt and sentence without the intervention of a jury, where a jury trial had been voluntarily waived, *State* v. *Ferguson,* 175 Ohio St. 390, 396 (1964) and *State* v. *Frohner,* 150 Ohio St. 53 (1948). This Court held that Ohio's pre-*Furman* statutory scheme was constitutional in *McGautha* v. *California,* 402 U.S. 183 (1971). It is submitted that the imposition of sentence by a three-judge panel or trial court under the present statutory scheme is no different constitutionally than allowing a three-judge panel to impose sentence without the intervention of a jury under the previous statutory scheme.

III.

Again, this issue of allocating the burden of proof to the defendant during the mitigation here, was not raised or preserved by the Petitioners in the trial courts.

At the time the mitigation hearing is conducted a defendant stands convicted of aggravated murder and at least one of the aggravating circumstances which was specified in the indictment. The introduction of mitigating circumstances has traditionally been a defense function. The mitigating circumstances listed in Section 2929.04 (B) are far broader than affirmative defense which the defense must bear the burden of going forward with evidence upon in order to excuse or otherwise justify the commission of an offense.

Once the defendant stands convicted of the charge and specification, it should rightfully be his burden to present

evidence as to why the punishment should be lessened. To require the defendant to do so does not infringe upon any due process rights, *State* v. *Lockett*, 49 Ohio St. 2d 48, 65-66 (1976).

Placing the burden of proof on the defendant at mitigation is clearly distinguishable from placing a burden of proof on the defendant to prove his innocence. For that reason it is submitted that the Ohio statutory procedure does not run afoul of the Due Process Clause as this Court has interpreted that clause in the cases of *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975) and *In re Winship*, 397 U.S. 358 (1970). In both those cases the Court stated it was the government's burden to prove guilt beyond a reasonable doubt. Ohio statutory scheme does not deviate from that command and is consistent with the Court's ruling in *Leland* v. *Oregon*, 343 U.S. 790 (1952).

IV.

Like the previous two issues the issue of sufficiency of appellate review was not raised or preserved in the State Courts. Over three months elapsed from the time this Court rendered its decisions on July 2, 1976 and the time Petitioners' cases were argued before the Supreme Court of Ohio. Nevertheless, no challenge to the Ohio capital punishment system was made based on the grounds set forth in the questions II, III, and IV of the Amicus Brief.

It is submitted that defendants facing the death penalty in Ohio have adequate appellate review so as to insure that the penalty is not arbitrarily or capriciously imposed. Defendants have a direct right of appeal to the Court of Appeals and a direct right of appeal to the Supreme Court of Ohio where the lower court of review affirms their death sentence, Rule 4 (B), Ohio Rules of Appellate Procedure

and Section 2 (B) (2) (a) (ii), Article IV of the Ohio Constitution. Thus, the Supreme Court of Ohio, a court with statewide jurisdiction, affords a defendant sentenced to death a full judicial review so as to promote the even-handed, rational and consistent imposition of the death sentences under law. *Jurek* v. *Texas*, — U.S. —, 96 S. Ct. 2950, 2958 (1976); *State* v. *Miller*, 49 Ohio St. 2d 198, 204 (1977).

This Court has never mandated a particular form of appellate review in death penalty cases. In *State* v. *Bayless*, 48 Ohio St. 2d 73, 86 (1976), the Supreme Court of Ohio stated that in all capital cases the aggravating and mitigating circumstances would be independently reviewed in each case to insure that capital sentences are fairly imposed by Ohio's trial judges. As the Supreme Court of Ohio observed in *State* v. *Osborne*, 49 Ohio St. 2d 135, 146 (1976), "The Ohio statutes require the death sentence to be imposed upon all defendants convicted of aggravated murder coupled with at least one of seven aggravating circumstances, provided that none of the three mitigating factors exists." Accordingly, all similarly situated defendants are sentenced alike and have their sentences reviewed by a court of statewide jurisdiction.

Contrary to Petitioners' assertion, the Supreme Court of Ohio is not precluded from inquiring into whether findings of fact are correct. In *State* v. *Edwards*, 49 Ohio St. 2d 31, 47 (1976), the Supreme Court of Ohio stated that a determination of whether there is substantial evidence to support the verdict rendered whether it be the verdict on the criminal charge, aggravating circumstance, or mitigating circumstance, would be made in each capital case. This scope of review is consistent with both the review afforded by the courts in Georgia and Florida which this Court has determined to pass constitutional standards.

The fact that the Supreme Court of Ohio has affirmed all but one capital sentence it has reviewed only indicates that the Ohio statutory scheme has narrowed the scope of the statutes which provide for the death penalty, with further provisions to focus on the individual nature of the crime and characteristics of the defendant, so that all those upon whom the death penalty is imposed are truly similarly situated.

V.

Amicus has raised an issue that has never been raised by Petitioner, that is, the retroactive application of the Ohio law on attempt. Petitioner Woods did raise the issue of whether there had been an attempt established by the evidence. That issue, however, has been abandoned by Petitioner Woods in his Petition for Writ of Certiorari. Petitioner Reaves has never challenged the evidentiary sufficiency of his conviction. In accordance with *Cardinale* v. *Louisiana*, 394 U.S. 437 (1969), Respondent submits it would be improvident to grant certiorari on an issue raised before this court for the first time.

The Ohio statute on attempt, Section 2923.02 (A) of the Ohio Revised Code, was enacted on January 1, 1974, one full half year before the crime in this case was perpetrated.

Petitioners drove to the crime scene in Petitioner Reaves' car which they parked on an adjacent street. When they heard what they thought was police sirens they started walking away from the direction of their automobile and down Florence Avenue.

The Supreme Court of Ohio has construed Section 2923.-02 (A) to be consistent with Section 5.01 of the Model Penal Code which sets forth the "substantial step" test.

CONCLUSION

For the reasons set forth above it is respectfully submitted this Court should deny Petitioners' Petition for Writ of Certiorari.

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